disposition of their pre-embryos. *See A.Z.*, 725 N.E.2d at 1056–57 (citing concerns about IVF agreements that lack duration clauses); J.A. at 36–38.

Lastly, by its terms, the primary purpose of the informed consent form is to protect the Center in its business relationship with the parties, not to serve as a binding agreement between Reanna and Axel. J.A. at 36–38. Most of the form's provisions limit the Center's liability, e.g., a release, an assumption of the risk, and a liquidated damages clause. J.A. at 37. The form is not expressly intended to operate as a binding dispositional agreement if the parties disagree. *See A.Z.*, 725 N.E.2d at 1056 (citing concerns about enforcing informed consent forms that lack the parties' express intent for the agreement to govern disputes between the couple); J.A. at 36–38.

And while Axel may argue that the informed consent form reflects his intent, his advance consideration of the form's divorce question is not imputed to Reanna. J.A. at 8. Further, the record shows that Axel did not share his thoughts with Reanna before or during the visit when the couple signed the form. J.A. at 8. These circumstances indicate a lack of mutual assent to the informed consent form.

For this reason, the Court should find the agreement unenforceable. Therefore, the balancing-of-interests approach is the appropriate legal framework for deciding this case. *See Davis*, 842 S.W.2d at 604 (finding courts should apply the balancing-of-interests test absent an enforceable agreement).

CONCLUSION

This Court's decision to affirm would ensure that Texans are protected, not punished, when they change their minds about procreation—in effect, when they act human. The balancing-of-interests test is the appropriate legal framework for deciding this case because it embodies principles codified in Texas law and is consistent with precedent. Even if the contractual approach is proper in some cases (it is not here), applying the balancing-of-interests test is necessary when the parties do not have an enforceable agreement. Reanna and Axel lack such an agreement. Either way, the balancing-of-interests approach best protects our citizens' procreative interests.

CERTIFICATE OF COMPLIANCE WITH RULE 3.02(e)

This brief complies with the type-volume limitation of Rule 3.02(e) because it contains 5,411 words, excluding the parts of the brief exempted by that Rule.

/s/ Olivia Schoffstall
Attorney for Respondent
Brief submitted to Professor Jaeger

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June 5th, 2023

The Honorable David Morales
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1133 N. Shoreline Blvd.
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Dear Judge Morales:

I am an incoming third-year law student at the Texas Tech University School of Law. I am writing to apply for a judicial clerkship in your chambers for the 2024–2025 term. I am applying to your chambers specifically because I would like to continue to grow and contribute my legal skills in Corpus Christi. Growing up just outside of Houston and having family near Corpus Christi, I wish to start my legal career in a city I spent numerous summers on the beach and watching the Corpus Christi Hooks play baseball. I am confident that my academic accomplishments, writing skills, and experiences will enable me to contribute substantively as your judicial clerk.

A passion for advocacy is essential to succeeding as a law clerk. At Texas Tech, I have continuously excelled in moot court advocacy competitions tailored toward a federal clerkship. Last fall, I was chosen as an oral advocate and brief writer for Texas Tech's nationally ranked moot court traveling team. My partners and I earned the second-highest brief and advanced to the national championship round at the Leroy Hassell National Constitutional Law Moot Court Competition. The competition featured twenty-eight other law schools and was judged by numerous federal district court judges from the Eastern District of Virginia. This opportunity taught me crucial lessons in time management, succinct organization, working as a team in an appellate environment, and persuasion in front of a judicial audience. Because of my dedication and experience in this scope, I was nominated by Texas Tech Law's Board of Barristers to serve as the Director of Written Appellate Advocacy for the 2023–2024 year.

Further, throughout law school, I have sought out and constantly excelled in academics, legal research, and writing. Importantly, I have excelled in a course load tailored toward a federal district court clerkship. Out of 146 students, I am currently ranked twentieth in my class and have earned high grades in classes like Evidence, Trial Advocacy, Appellate Advocacy, and Business Entities. This year, I am taking Federal Courts hopefully to bolster my understanding and knowledge of the federal-legal system. Beyond my academic accomplishments, my writing has led me to success in my time as a member for the Texas Tech Law Review. Most recently, my student article, *Deplatforming Censorship: How Texas Constitutionally Barred Social Media Platform Censorship*, was selected for internal publication for Texas Tech Law Review's spring issue. This article focuses on whether social media platforms' censorship efforts are protected by the First Amendment—a topic currently on the cutting-edge of an intersection between constitutional law and modern technology. Throughout the writing process, I navigated decades of Supreme Court precedent and produced a thorough, neutral answer to the differing circuit opinions—skills that provide me a good foundation for excelling in your chambers for the various issues that come before your bench. These qualities enabled me to successfully run for and be selected as Lead Articles Editor for Volume 56 of the Texas Tech Law Review for the 2023–2024 year, as well as receiving the W. L. Penn Award, awarded to the student comment that most effectively summarizes and addresses an important constitutional law issue. I believe these qualities and experiences have prepared me to excel as a judicial clerk in your chambers.

I have included my resume, writing sample, unofficial transcript, and letters of recommendation. I welcome the opportunity to interview with you, and I appreciate your time and consideration.

Respectfully,

Christian M. Shaffer

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RAPP & KROCK PC, Houston, Texas — June 2022 – August 2022
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- Drafted research memorandums on a variety of complex substantive and procedural matters and contributed to writing numerous legal documents such as demand letters, petitions, motions for attorney's fees. Assisted in preparation for depositions, hearings, and trials with various commercial litigation attorneys. Summarized case law to use as examples in trial and appellate procedures in the commercial litigation department.

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SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021 Law						
LAW	5108	Intro. to the Study of Law	1.00	A	4.00	
LAW	5306	Legal Practice I	3.00	C+	7.50	
LAW	5402	Contracts	4.00	B	12.00	
LAW	5404	Torts	4.00	A	16.00	
LAW	5405	Civil Procedure	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 55.50 GPA: 3.46						
Spring 2022 Law						
LAW	5307	Legal Practice II	3.00	B	9.00	
LAW	5310	Criminal Law	3.00	B+	10.50	
LAW	5401	Constitutional Law	4.00	B	12.00	
LAW	5403	Property	4.00	B+	14.00	
Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 45.50 GPA: 3.25						

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SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
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Summer 2022 Law						
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LAW	6357	Professional Responsibility	3.00	B+	10.50	
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 22.50 GPA: 3.75						
Fall 2022 Law						
LAW	6023	National Security Law and The Constitution	3.00	B+	10.50	
LAW	6094	Banking Law	3.00	A	12.00	
LAW	6340	Academic Legal Writing	3.00	A	12.00	
LAW	6415	Wills and Trusts	4.00	B+	14.00	
LAW	7004	Skills Development	1.00	CR	0.00	
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LAW	6047	Trial Advocacy - Tethered	2.00	A	8.00	
LAW	6416	Evidence - Tethered	4.00	A	16.00	
LAW	6435	Business Entities	4.00	A	16.00	
LAW	7004	Skills Development	1.00	CR	0.00	
Ehrs: 13.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00						
Summer 2023 Law						
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SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2023 Law						
IN PROGRESS WORK						
LAW	6021	Higher Education Law	3.00	IN PROGRESS		
LAW	6033	Federal Courts	4.00	IN PROGRESS		
LAW	6057	Vineyard and Winery Law	3.00	IN PROGRESS		
LAW	6420	Commercial Law	4.00	IN PROGRESS		
LAW	7002	Law Review	1.00	IN PROGRESS		
		In Progress Credits 15.00				
Spring 2024 Law						
IN PROGRESS WORK						
LAW	6236	Civil Trial: Practice & Litigation Materials	2.00	IN PROGRESS		
LAW	6237	Law and Religion	2.00	IN PROGRESS		
LAW	6241	Legal History Seminar	2.00	IN PROGRESS		
LAW	6434	Income Taxation	4.00	IN PROGRESS		
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********** END OF TRANSCRIPT **********

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DEPLATFORMING CENSORSHIP:
HOW TEXAS CONSTITUTIONALLY BARRED SOCIAL MEDIA PLATFORM CENSORSHIP
ARTICLE*

*Christian Shaffer, Staff Editor, Texas Tech Law Review, J.D. Candidate, Texas Tech University School of Law, 2024; B.A. Philosophy and Political Science, *summa cum laude*, Washington State University. The author would like to thank Texas Tech School of Law Dean Jack Wade Nowlin for his editorial contributions and feedback throughout the writing process of this article. Additionally, the author would like to thank his Article Editor, Tyler Smotherman.

ABSTRACT

Social media platforms have long exercised an unfettered power to censor their users for reasons the platforms see fit. With the recent revelation of the "Twitter Files," the control that platforms exert on user-content has reached a dangerous level. Censorship occurs when a platform suppresses the user's expressive opinion in various ways—removal, demonetization, deamplification, and shadow banning. In September 2021, Texas enacted a law restricting a platform's ability to suppress a user's content based on the user's viewpoint. Although hailed for its protection of the "free market of ideas," this law received immediate criticism and legal challenge from various social media platforms.

As other states look to implement their own anticensorship laws, and it becomes increasingly more likely that the Supreme Court will take up the issue, the Court's "right not to speak test" (platforms' main argument against anticensorship laws) from Rumsfeld v. Forum for Academia & Institutional Rights, Inc., reveals that censorship laws are likely constitutional because censorship does not receive First Amendment protection. Texas's anticensorship law passes muster—because the law does not compel platforms to produce any message, nor are platforms blocked from disseminating contrary information, the law does not violate a social media platforms' right not to speak. In the alternative, even if censorship is protected speech under *Rumsfeld*, Texas's law passes First Amendment scrutiny because the law is content-neutral, and states have a valid interest in keeping the marketplace of ideas open and limiting the market control that platforms have over the internet.

This Article is the first to examine the Fifth Circuit's recent decision in NetChoice, LLC v. Paxton (upholding Texas's anticensorship law), provides guidance and reasoning for why the Supreme Court should decide in Texas's favor, and proposes model legislation for other states to implement. Furthermore, this Article is the first to examine the Court's precedent in light of the revelation of the "Twitter Files" and other related social media moderation practices since 2022.

I. INTRODUCTION

In September 2021, Texas Governor Greg Abbot enacted Texas House Bill 20 (HB20), an anticensorship law that restricts platforms' ability to censor content or profiles based on their associated viewpoints.[1] Texas enacted this law in response to a series of social media platforms such as Twitter, Facebook, and YouTube restricting a number of conservative politicians and commentators.[2] In response, social media platforms filed suit in federal court against the Attorney General of Texas, Ken Paxton, arguing that the act violated the companies' First Amendment rights.[3] Largely, commentators arguing for the unconstitutionality of the bill argue that under Supreme Court precedent, the platforms have a "right not to speak," and that this bill infringes on that right.[4] Yet, as recently held by the Fifth Circuit, Texas's anticensorship law passes constitutional muster.[5] While private entities generally have a "right not to speak," it is not clear how social media companies can assert the same right when they operate as a conduit of speech rather than a publisher of speech.[6] Therefore, states generally can enact anticensorship laws that follow Texas's formula for anticensorship.[7]

This Article discusses why Texas's law is constitutional under Supreme Court precedent and why the Fifth Circuit has held the law constitutional.[8] Additionally, this Article will focus on the limits and scope of such laws and the lessons learned from the Eleventh Circuit's opinion in

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[1] TEX. CIV. PRAC. & REM. CODE ANN. § 143A.
[2] *See* Mukund Rathi, *Victory! Federal Court Blocks Texas' Unconstitutional Social Media Law*, ELECTRONIC FRONTIER FOUNDATION (December 14, 2021) https://www.eff.org/deeplinks/2021/12/victory-federal-court-blocks-texas-unconstitutional-social-media-law.
[3] *See* Shannon Bond, *Here's why Tech Giants want the Supreme Court to Freeze Texas'[s] Social Media Law*, NPR (May 19, 2022) https://www.npr.org/2022/05/19/1099870039/supreme-court-social-media-law-texas.
[4] *Id.*
[5] *See* NetChoice, LLC v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022).
[6] *Id.*
[7] *Id.* at 494.
[8] *See* discussion *infra* Section III.A (discussing how Texas's anticensorship law passes muster under a series of Supreme Court cases).

NetChoice, LLC v. Attorney General of Florida.[9] Part II provides a background of modern censorship practices and the Court's precedent relied upon by both sides of the censorship.[10] Part III will address why Texas's anticensorship law is constitutional under the Supreme Court's jurisprudence under "right not to speak" cases.[11] Part IV will discuss policy concerns for the importance of allowing a "free flowing marketplace of ideas," and the adverse effects censorship has on polarization and ideological echo chambers.[12] Part V will demonstrate why the Eleventh Circuit's analysis of anticensorship laws is incorrect, and why the Supreme Court should adopt the Fifth Circuit's analysis.[13] Finally, Part VI will provide model legislation that states can pass/implement that will survive constitutional muster.[14]

II. Asserting a "Right not to Speak" on the Internet under the First Amendment

Generally, the First Amendment is a constitutional guarantee that prevents the government from "enacting laws abridging the freedom of speech . . . ."[15] This protection, like other constitutional guarantees, prohibits government action, not private action.[16] This right covers both an entity's ability to speak and the "right to refrain from speaking at all."[17] Therefore, under the

[9] *See* discussion *infra* Section II.B.1-4 (explaining the precedent that the Supreme Court uses for right not to speak cases).
[10] This article will look at the structure of Texas's law, the recent exposure of the "Twitter Files," and the political implications of censorship. *See* discussion *infra* Section II. A-B (describing a synopsis of censorship practices by social media platforms, including the Twitter Files).
[11] *See* discussion *infra* Section III.A, III.B (showing the constitutionality of Texas's law under Supreme Court precedent).
[12] *See* discussion *infra* Section IV.A-B (illustrating the various legal policy concerns regarding the dangers of social media censorship).
[13] *See* discussion *infra* Section V (noting various counterarguments stemming from the Eleventh Circuit's interpretation of censorship issues).
[14] *See* discussion *infra* Section VI.A-C (proposing model legislation that states can implement that survives constitutional scrutiny under the First Amendment).
[15] U.S. Const. amend. I.
[16] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
[17] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

First Amendment, state governments cannot force private entities to endorse or speak someone else's message.[18]

In terms of governmental suppression of speech, the First Amendment permits the government to regulate the conduct of entities that host speech.[19] However, the government cannot force that entity to speak or have their message interfered with.[20] Under a line of cases from the Supreme Court, a fundamental principle has emerged: "the freedom of speech . . . which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility . . . or an unrestricted and unbridled license that gives immunity for every possible use of language."[21]

A. Modern History of Social Media Platform Censorship

The internet (and more importantly its intricacies) control almost every aspect of our everyday lives—distributing constant status updates, news alerts, connectivity, and shared information.[22] Between 2000 and 2019, the number of people using the internet increased by 1,104%, encompassing over 56% of the global population.[23] Furthermore, the right to internet

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[18] *Id.* at 714.
[19] *See generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (explaining that a California law that forbids a shopping mall owner from removing religious pamphleteers from a privately owned shopping mall was constitutional under the First Amendment).
[20] *See generally* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. at 60 (explaining that governmental regulation which affects what an entity can do—rather than instructing what the entity shall or shall not say—is constitutional under the First Amendment).
[21] Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* Patterson v. Colorado, 205 U.S. 454, 462 (1907); Schenck v. United States, 249 U.S. 47, 52 (1919); Schaefer v. United States, 251 U.S. 466, 474 (1920).
[22] *See* Matthew Giannelis, *Impact of the Internet on Modern Society*, TECH BUSINESS NEWS (Nov. 11, 2022) https://www.techbusinessnews.com.au/blog/impact-of-the-internet-on-modern-society/#:~:text=It%20has%20altered%20society%20in,sites%20to%20local%20news%20sources.
[23] Suzie Ocie*, A Brief History of Internet Censorship* (Apr. 20, 2019) https://www.influencive.com/a-brief-history-of-internet-censorship/.

access has received international protection, with the United Nations in 2011 deeming "internet access" a human right under international law.[24]

This "global ecosystem"[25], however, has seen a constant regression from the once purported "marketplace of ideas."[26] Instead, the internet has morphed into a few platforms controlling the influence on user's perception of public, social, and economic issues.[27] The problematic balance in the hands of platforms is, while there has been a rise in beneficial dialogue between users, there has also been a rise in the advancement of extremist views and negative behavior.[28] Therefore, there was a need for a solution that balances these interests—a solution that has adapted into modern-day censorship.[29]

Generally, *online censorship* can be defined as the restriction of a user's expressive content.[30] Although censorship is not new,[31] the "Year of Deplatforming[,] [2018]" put platforms' censorship efforts under the global spotlight.[32] In a Wall Street Journal article by Law Professor Glenn Reynolds, he stated that, "If you rely on someone else's platform to express unpopular ideas,

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[24] David Kravets, *U.N. Report Declares Internet Access a Human Right*, WIRED (Jun. 3, 2011) https://www.wired.com/2011/06/internet-a-human-right/.
[25] PEW RESEARCH CENTER, *The Future of Free Speech, Trolls, Anonymity and Fake News Online* (Mar. 29, 2017) https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/.
[26] Matal v. Tam, 137 S. Ct. 1744, 1762 (2017).
[27] *See* Cal Newport, *TikTok and the Fall of the Social-Media Giants*, THE NEW YORKER (July 28, 2022) https://www.newyorker.com/culture/cultural-comment/tiktok-and-the-fall-of-the-social-media-giants; Christiano Lima, *Antitrust Influences? Big Tech Allies, Opponents on Draft Social Media Starts into Bout*, THE WASHINGTON POST (July 22, 2022) https://www.washingtonpost.com/politics/2022/06/22/antitrust-influencers-battle-over-reining-big-tech-turns-social-media-stars/.
[28] *See* Peter Bergen, ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media, U.S. Senate Committee on Homeland Security, Permanent Subcommittee on Investigations (July 6, 2016) https://www.hsgac.senate.gov/imo/media/doc/Bergen%20Testimony_PSI%202016-07-06.pdf.
[29] *See* Vera Eidelman et al., *The Problem with Censoring Political Speech Online—Including Trump's*, ACLU (June 15, 2021) https://www.aclu.org/news/free-speech/the-problem-with-censoring-political-speech-online-including-trumps.
[30] *See* Glenn Reynolds, *When Digital Platforms Become Censors*, THE WALL STREET JOURNAL (Aug. 18, 2018) https://www.wsj.com/articles/when-digital-platforms-become-censors-1534514122?mod=rsswn.
[31] *See id.* ("the internet giants decided to slam the gates on a number of people and ideas they don't like."); For an extensive timeline on censorship, see *Suzie Ocie*, *supra* note 23.
[32] *See* Reynolds, *supra* note 30.

especially ideas on the right, you're at risk.[33] This raises troubling questions not only for free speech but for the future of American politics and media.[34] But where exactly does this track lead us?

Abroad, censorship efforts by China and Russia show not only censorship's effects on democracy but the equally devastating effects on individual and personal beliefs. For example, in 2022, the Russian government blocked the citizenry's access to at least eight news media sites that were independently broadcasting the war in Ukraine.[35] The Russian government seeks to shape not only a false narrative of Russia's war efforts but to eliminate any negative criticism against the Russian government.[36] The consequences of these efforts not only keep the Russian public out of the information cycle but eliminate any contrary debate.[37] Although western social media censorship is not at the level of the Russian government, the concerns remain the same.

1. The Twitter Files: Censorship takes a Dangerous Turn

Starting in late-December, Twitter CEO, Elon Musk oversaw a dramatic release of information regarding Twitter's censorship efforts over the past decade.[38] The dubbed "Twitter Files" exposed years of information stemming from Twitter's internal documents and revealed a

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[33] *Id.*
[34] *Id.*
[35] *See* HUMAN RIGHTS WATCH, *Russia: With War, Censorship Reaches New Heights*, (Mar. 4, 2022, 9:04 AM), https://www.hrw.org/news/2022/03/04/russia-war-censorship-reaches-new-heights.
[36] Adam Satariano, *Russia Intensifies Censorship Campaign, Pressuring Tech Giants*, THE NEW YORK TIMES (Feb. 26, 2022) https://www.nytimes.com/2022/02/26/technology/russia-censorship-tech.html.
[37] Robert McMahon, *Russia is Censoring News on the War in Ukraine. Foreign Media are Trying to get Around that*, COUNCIL ON FOREIGN RELATIONS (Mar. 18, 2022, 11:55am), https://www.cfr.org/in-brief/russia-censoring-news-war-ukraine-foreign-media-are-trying-get-around; *see also Thomas Kent*, *How to Reach Russian Ears*, CENTER FOR EUROPEAN POLICY ANALYSIS (Mar. 8, 2022) https://cepa.org/article/how-to-reach-russian-ears/ (explaining misinformation's detrimental effects on the Russian public).
[38] Benjamin Wallace-Wells, *What the Twitter Files Reveal About Free Speech and Social Media*, THE NEW YORKER (Jan 11, 2023), https://www.newyorker.com/news/the-political-scene/what-the-twitter-files-reveal-about-free-speech-and-social-media.

central point: Censorship was far worse than imagined.[39] Currently, there are fourteen "threads" of released information[40]—each thread focusing on a different topic.[41] Matt Taibbi, one of the journalists permitted to release Twitter-related information, tweeted that "[t]he 'Twitter Files' tell an incredible story from inside one of the world's largest and most influential social media platforms. It is a *Frankensteinian tale* of a human-built mechanism grown out the control of its designer."[42]

For free speech advocates, the Twitter Files have been hailed as a revealing exposé; however, for others, they are nothing more than a false conspiracy.[43] For example, some have found the Twitter Files as nothing more than "[Elon Musk] identifying perceived injustices from site's past—biases and so-called abuses of power—and using them as a playbook to run on his ideological opponents."[44] Importantly, however, even if Elon Musk is using the Twitter Files as a

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[39] *See generally* Devin Coldewey, Musk's 'Twitter Files' Offer a Glimpse of the Raw, Complicated and Thankless Task of Moderation, YAHOO! FINANCE (Dec. 9, 2022), https://ca.finance.yahoo.com/news/musks-twitter-files-offer-glimpse-222441377.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAAC4GgPmC7SYtVHK0nRhw0ihM2DU18gul6lrripxjGgGfwjoRANvGip2I7i_LGj0x0x-DNc-tDlxl7H4H2TbD62pkK0AV3k-ZrMffH8ADzSUZlmqwTZeBaGok2LBiOZJfq1DWa2xH1-aE2OBx-iWYv7kVQ_-hwKvrgdMsqCFSJlpZ. (explaining how the Twitter files show "to the great interest of anyone who ever wondered what moderators actually do, say, and click as they make decisions that may affect millions.").

[40] *See* Michael M. Grynbaum, *Elon Musk, Matt Taibbi, and a Very Modern Media Maelstrom*, THE NEW YORK TIMES (Dec. 4, 2022), https://www.nytimes.com/2022/12/04/business/media/elon-musk-twitter-matt-taibbi.html.

[41] On December 2nd, 2022, when the first thread was released, Elon Musk tweeted "Here we go!!" Elon Musk (@elonmusk), TWITTER (Dec. 2, 2022, 5:44 PM), https://twitter.com/elonmusk/status/1598825403182874625?cxt=HHwWgoCw6fbOlbAsAAAA.

[42] Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 5:44 PM), https://twitter.com/mtaibbi/status/1598824834334687236 (emphasis added); The term "Frankensteinian" is defined as "a person who creates something that brings about his or her ruin." *Frankensteinian*, COLLIN'S DICTIONARY (2019) https://www.collinsdictionary.com/dictionary/english/frankenstein.

[43] *See generally* Charlie Warzel, *Elon Musk's Twitter Files are Bait*, THE ATLANTIC (Dec. 9, 2022), https://www.theatlantic.com/technology/archive/2022/12/elon-musk-twitter-files-documents-bari-weiss/672421/ (explaining how "the 'Twitter Files' entries are sloppy, anecdotal, devoid of context, and, well, old news.").

[44] *Id.*

vehicle for ideological advancement, they reveal social media censorship practices related to politicians[45], government agencies[46], and a danger to overall speech.

Although the Twitter Files are dense[47], a few examples are worth discussion. First, on numerous occasions Twitter would fulfill various politicians' requests for information to be censored.[48] For example, in 2020, affiliated-members with President Biden's staff would request Twitter's moderation team to remove certain tweets.[49] The catalyst for these requests stemmed from the New York Post's publication of an article revealing information about Hunter Biden's laptop.[50] Twitter responded by "[taking] extraordinary steps to suppress the story, removing links and posting warnings that it may be 'unsafe.' They even blocked its transmission via direct message."[51]

Twitter and the Government's relationship did not stop there—in 2020, Twitter began acting at the direction and coordination of numerous government agencies and departments.

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[45] For example, in April 2020, United States House Representative member Adam Schiff's staff sent an email request to Twitter executives asking them for a "complete suppress[ion of] any and all search results about Mr. Misko and other Committee staffers." *See* Matt Taibbi (@mtaibbi), TWITTER (Jan. 13, 2023) https://twitter.com/mtaibbi/status/1613932027312480263.

[46] *See* Matt Taibbi (@mtaibbi), TWITTER (Jan. 3, 2023, 3:54 PM) https://twitter.com/mtaibbi/status/1610394278617878529.

[47] For an in-depth discussion on all of the evidence released through the Twitter Files, see Benjamin Wallace-Wells, *What the Twitter Files Reveal About Free Speech and Social Media*, THE NEW YORKER (Jan 11, 2023), https://www.newyorker.com/news/the-political-scene/what-the-twitter-files-reveal-about-free-speech-and-social-media.

[48] Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 5:47 PM), https://twitter.com/mtaibbi/status/1598826284477427713 ("[politicians] began petitioning the company to manipulate speech as well: first a little, then more often, then constantly.").

[49] As Matt Taibbi's thread shows, this process was as easy as a request and the request would be "Handled." *See, e.g.*, Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 5:52 PM), https://twitter.com/mtaibbi/status/1598827602403160064.

[50] To view the original article, see Emma Jo-Morris, et al., *Smoking-gun Email Reveals how Hunter Biden Introduced Ukrainian Businessman to VP dad*, NEW YORK POST (Oct. 14, 2020, 5:00 AM), https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/.

[51] Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 6:08 PM), https://twitter.com/mtaibbi/status/1598831435288563712. Furthermore, White House Press Secretary Kayleigh McEnany was banned off Twitter for tweeting on the story. Steven Nelson, *WH Press Secretary Locked out of Twitter for Sharing Post's Hunter Biden Story*, NEW YORK POST (Oct. 14, 2020, 7:06 PM), https://nypost.com/2020/10/14/kayleigh-mcenany-locked-out-of-twitter-for-sharing-posts-hunter-biden-story/.

Departments such as the Senate Intel Committee, the Treasury department, National Security Agency, and the Federal Bureau of Investigation were all directing Twitter to engage in large-scale moderation efforts for a variety of reasons stemming from national security concerns to a general disliking of the account.[52] Through these efforts, not only has Twitter censored users on behalf of the government but have revealed that they do not even follow their own moderation policies.[53]

Ultimately, Twitter releases more information everyday about Twitter's moderation practices.[54] Yet, this brief overview is essential for context because it reflects the policy behind both the Fifth Circuit's decision in *Paxton* and why it matters to everyday social media users.[55]

2. Censorship is not a Partisan Problem

Political commentators have pinpointed the 2020 presidential election as the catalyst of platforms' censorship on political viewpoints.[56] According to the Pew Research Center, lawmakers and social media users engaged in far more online activity regarding politics.[57] With this increase in user activity, the dividing partisan animosity between opposing political views followed.[58]

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[52] To view the emails sent by various government agencies to Twitter executives, see Matt Taibbi (@mtaibbi), TWITTER (Jan. 3, 2023), https://twitter.com/mtaibbi/status/1610394281683959811?cxt=HHwWhoC-waTEotksAAAA.

[53] In an email exchange between Twitter and Adam Schiff, a United States House Representative, Twitter acknowledged that their own policy was being tested by the government's requests. *See* Matt Taibbi (@mtaibbi), TWITTER (Jan. 3, 2023), https://twitter.com/mtaibbi/status/1610394287992344576.

[54] For updated information on the Twitter Files, the Twitter profiles of Matt Taibbi and Bari Weiss are updated daily. Matt Taibbi (@mtaibbi), TWITTER, https://twitter.com/mtaibbi (last visited Jan 19, 2022); Bari Weiss (@bariweiss), TWITTER, https://twitter.com/bariweiss (last visited Jan. 19, 2022).

[55] *See supra* text accompanying notes 257–283 (explaining the dangers and risks that everyday users face when their information is censored on a social media platform).

[56] PEW RESEARCH CENTER, Charting Congress on Social Media in the 2016 and 2020 Elections, (Sept. 30, 2021), https://www.pewresearch.org/politics/2021/09/30/charting-congress-on-social-media-in-the-2016-and-2020-elections/.

[57] For example, on Twitter, lawmakers alone produced 74,000 more tweets compared to the 2016 election sparking higher engagement, outrage, and hostility between different political groups. *Id.* Interestingly, the word "Trump" was the most used word by Democratic lawmakers during the 2020 election; however, the word "great" was the most used by Republican lawmakers. *See id.*

[58] *See generally* David French, *It's Clear that America is Deeply Polarized. No Election can Overcome That*, TIME (Nov. 4, 2020, 11:57am), https://time.com/5907318/polarization-2020-election/. (explaining how "the nation's politics look like a version of trench warfare, where massive effort is expended to achieve the most incremental gains and the emotional and financial costs of stalemate only escalate.").

Furthermore, the amount of information (including misinformation) about controversial topics—the COVID-19 pandemic, conspiracy theories, voter fraud, and election fraud—rose substantially.[59] Correlatively, as the amount of posted information rose, the amount of suspended accounts rose with it. For example, in 2018, Twitter suspended over 70 million accounts in just two months[60], while in 2021, the platform suspended 70,000 accounts in twenty-four hours for engaging in discussions about the conspiracy theory group QAnon.[61]

To make things worse, the January 6th capitol riots reinforced platforms' efforts in purging certain accounts.[62] As a result of former President Donald Trump's involvement, just two days later, he was permanently deplatformed from Twitter.[63] Facebook and YouTube quickly followed.[64] In a post from Mark Zuckerberg, Chief Executive Officer of Meta (previously known as Facebook), he stated:

> The shocking events of the last 24 hours clearly demonstrate that President Donald Trump intends to use his remaining time in office to undermine the peaceful and lawful transition of power to his elected successor, Joe Biden.

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[59] PEW RESEARCH CENTER, Charting Congress on Social Media in the 2016 and 2020 Elections, (Sept. 30, 2021).
[60] *See* Reuters Staff*, Twitter Suspends over 70 Million Accounts in two months*, WASHINGTON POST (Jul. 6, 2018) https://www.reuters.com/article/us-twitter-inc-suspensions/twitter-suspends-over-70-million-accounts-in-two-months-washington-post-idUSKBN1JW2XN.
[61] In July 2020, Twitter stated that any discussion from QAnon "related" accounts would result in suspensions, deplatforming, and content restrictions. *Id.*
[62] While a joint session of Congress was affirming President-elect, Joe Biden's presidential victory, a riot outside of the United States capitol eventually would lead to five deaths and numerous arrests. THE UNITED STATES ATTORNEY'S OFFICE: DISTRICT OF COLUMBIA, *One Year Since the Jan. 6 Attack on the Capitol* (Dec. 30, 2021), https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol.
[63] BALLOTPEDIA, *Elected Officials Suspended or Banned from Social Media Platforms*, https://ballotpedia.org/Elected_officials_suspended_or_banned_from_social_media_platforms (last visited Oct. 18, 2022). Since Elon Musk's acquisition of Twitter, former President Trump's account on Twitter was allowed back onto the platform. Shannon Bond*, Elon Musk Allows Donald Trump Back on Twitter*, NPR (Nov. 19, 2022), https://www.npr.org/2022/11/19/1131351535/elon-musk-allows-donald-trump-back-on-twitter.
[64] *See id.*

> His decision to use his platform to condone rather than condemn the actions of his supporters at the Capitol building has rightly disturbed people in the US and around the world. We removed these statements yesterday because we judged that their effect -- and likely their intent -- would be to provoke further violence.
>
> . . . .
>
> Over the last several years, we have allowed President Trump to use our platform consistent with our own rules, at times removing content or labeling his posts when they violate our policies. We did this because we believe that the public has a right to the broadest possible access to political speech, even controversial speech. But the current context is now fundamentally different, involving use of our platform to incite [a] violent insurrection against a democratically elected government.
>
> We believe the risks of allowing the President to continue to use our service during this period are simply too great.[65]

President Trump's suspension immediately received backlash from world leaders.[66] For example, German Chancellor Angela Merkel, an outspoken critic of President Trump, stated that the platforms' actions were "problematic" because a sitting President's account was permanently

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[65] Guy Rose et al., *Our Response to the Violence in Washington*, META (Jan. 6, 2021) https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/ (emphasis added).
[66] Ryan Browne, *Germany's Merkel hits out at Twitter over 'Problematic' Trump ban*, CNBC (Jan. 11, 2021) https://www.cnbc.com/2021/01/11/germanys-merkel-hits-out-at-twitter-over-problematic-trump-ban.html.

suspended.[67] Furthermore, although the platforms' actions were on the global stage, they have continued to deplatform accounts of Texas politicians in equal force.[68] For example, Congressman Roger Williams had his Twitter campaign account suspended by the platform following a tweet in late November 2020.[69] Twitter explained its decision to temporarily suspend the Congressman because the tweet went against the platform's "civic integrity policy."[70] Furthermore, seven politicians since 2021 have been suspended from Twitter, Facebook, and YouTube for various reasons relating to election opposition, incitement to violence, and direct opposition to platforms.[71]

However, censorship is not politically one-sided—platforms have suspended several liberal-activist movements without cause.[72] For example, in August 2020, Facebook removed numerous leftist-promotion outlets related to "antifascist, anti-capitalist news, organizing, and

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[67] *Id.* Two other prominent world leaders that disavowed social media platforms' actions were French Finance Minister Bruno Le Maire and the President of Mexico, Andres Manuel Lopez Obrador. Mark Moore, *World Leaders Speak out Against Twitter Suspending Trump's Account*, THE NEW YORK POST (Jan. 12, 2022, 1:43 PM), https://nypost.com/2021/01/12/merkel-world-leaders-speak-out-against-trumps-twitter-ban/. Additionally, Alexey Nalvany, a Russian opposition figure, stated that Twitter's actions were "an unacceptable act of censorship," that would likely establish an irresponsible and dangerous precedent against the right of expression. *See* Matthew Bodner, *Russian Opposition Leader Navalny Slams Trump ban as 'Censorship*,' NBC NEWS (Jan 11, 2021) https://www.nbcnews.com/news/world/russian-opposition-leader-navalny-slams-trump-ban-censorship-n1253679. He further stated that "[t]his precedent [would] be exploited by the enemies of freedom of speech around the world. In Russia as well. Every time when they need to silence someone, they will say: 'This is just common practice, even Trump got blocked on Twitter . . . .'" *Id.*

[68] KXXV ABC NEWS, *Texas Congressman has Twitter Account Temporarily Suspended After Suggesting Election is Corrupt*, (Nov. 6, 2020) https://www.kxxv.com/hometown/texas/texas-congressman-has-twitter-account-temporarily-suspended-after-suggesting-election-is-corrupt.

[69] The tweet read, "This is the most corrupt election in our lifetime. Where is the DOJ and AG?" without further context. *Id.*

[70] *See* TWITTER HELP CENTER, *Civic Integrity Policy*, https://help.twitter.com/en/rules-and-policies/election-integrity-policy (last visited Nov. 22, 2022); *see also* TWITTER BLOG, *Our Approach to the 2022 US Midterms*, TWITTER, (Aug. 11, 2022), https://blog.twitter.com/en_us/topics/company/2022/-our-approach-to-the-2022-us-midterms (explaining how the "Civic Integrity Policy covers the most common types of harmful misleading information about elections and civic events . . . .").

[71] This list includes two US senators and four US house representatives. BALLOTPEDIA, *Elected Officials Suspended or Banned from Social Media Platforms*, https://ballotpedia.org/Elected_officials_suspended_or_banned_from_social_media_platforms (last visited Oct. 4, 2022).

[72] *See* Sanjana Varghese, *Twitter has Purged Left-Wing Accounts with no Explanation*, WIRED (Oct. 10, 2018), https://www.wired.co.uk/article/twitter-political-account-ban-us-mid-term-elections.

information sites."[73] For example, "It's Going Down," a social media page that reports on social struggles, news, and information related to investigative work on white supremacist groups and neo-Nazi networks, was taken entirely off of the platform.[74] Additionally, the New York Post saw it's account suspended on multiple separate occasions relating to reporting various stories circulating in 2021.[75] As discussed, these efforts largely stemmed from a joint effort from social media platforms and government intervention.[76]

Additionally, President Trump's own social media platform, "Truth Social," created because of the increasing censorship on other major platforms, regularly engages in censorship.[77] Ultimately, censorship is not a one-sided endeavor from a group of like-minded individuals. Instead, it reflects human nature—individuals seek to bolster their favored ideas and block out any

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[73] Natasha Lennard, *Facebook's Ban on Far-Left Pages is an Extension of Trump Propaganda*, THE INTERCEPT (Aug. 20, 2020, 2:30pm), https://theintercept.com/2020/08/20/facebook-bans-antifascist-pages/.
[74] *See id.*
[75] In April 2021, Facebook suspended the New York Post's news page after it posted an article regarding the spending by Black Lives Matter founder Patrisse Khan Cullors. *See* Post Editorial Board*, Social Media Again Silences The Post for Reporting the News*, NEW YORK POST (Apr. 16, 2021, 9:54am), https://nypost.com/2021/04/16/social-media-again-silences-the-post-for-reporting-the-news/. Additionally, just five months earlier, the New York Post's page was suspended for publishing an article about Hunter Biden's laptop. Emma-Jo Morris et al.*, Smoking-gun Email Reveals how Hunter Biden Introduced Ukrainian Businessman to VP Dad*, NEW YORK POST (Oct. 14, 2020, 5:00am), https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/. In February 2020, Twitter suspended the New York Post's account for publishing an article suggesting that there was a possibility the COVID-19 virus leaked from a Chinese laboratory. Steven Mosher*, Don't Buy China's Story: The Coronavirus may have Leaked from a Lab*, NEW YORK POST (Feb. 22, 2020), https://nypost.com/2020/02/22/dont-buy-chinas-story-the-coronavirus-may-have-leaked-from-a-lab/.
[76] *See supra* text accompanying notes 38-54 (illustrating how the Twitter Files revealed a collusive effort between social media platforms and the government in censoring certain political and personal opponents).
[77] *See* David Rosen, *Truth Social's Censorship, Terms of Service Defy Free Speech Promises*, PUBLIC CITIZEN (Sep. 19, 2022), https://www.citizen.org/news/truth-socials-censorship-terms-of-service-defy-free-speech-promises/. Truth Social's "free speech haven" has engaged in deplatforming topics involving January 6th, abortion, or any general anti-Trump message. Kimberly Leonard, *Trump's Purported Free-Speech Social-Media Platform, Truth Social, is Hiding User Posts, Threatening to Create a Curated 'Echo Chamber,' Research Group Finds*, BUSINESS INSIDER (Aug. 2, 2022, 1:12 pm), https://www.businessinsider.com/truth-social-is-shadow-banning-posts-despite-promise-of-free-speech-2022-8

opposing ones. Therefore, whether or not platforms have a target, left or right,[78] the consequences of censorship on public discourse are monumental.

Larger platforms serve as "central actors when it comes to [people's] collective ability to speak—and hear the speech of others—online."[79] When a platform censors a user, whether through deplatforming, shadow banning, or suspending, the reach of that message comes to a standstill, if not eradicated in its entirety.[80] Consequently, fewer users have access to the free range of ideas that circulate through various social mediums—limiting their ability to learn opposing viewpoints and ideas. Additionally, outcasted individuals, feeling slighted from their inability to express their thoughts in the conversation, typically retreat to their echo chambers—further increasing the polarization.[81] Instead of allowing the best ideas to be "accepted in the competition of the market,"[82] the current trend of censorship allows for these few platforms to control the message in a way that aligns with the platform's personal social and political views—a trend that not only threatens public debate but the nature of democracy itself.[83]

3. Texas's Response: Chapter 143A Discourse on Social Media Platforms

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[78] A recent Massachusetts Institute of Technology study suggests that conservative speech is four times as likely to be suspended. Qi Yang, et al., TRADE-OFFS BETWEEN REDUCING MISINFORMATION AND POLITICALLY-BALANCED ENFORCEMENT ON SOCIAL MEDIA, (Jun. 2, 20220), https://psyarxiv.com/ay9q5.

[79] Vera Eidelman et al., *The Problem with Censoring Political Speech Online – Including Trump's* (Jun. 15, 2021), https://www.aclu.org/news/free-speech/the-problem-with-censoring-political-speech-online-including-trumps.

[80] *See* John Koetisier, *Social Censorship: Should Social Media's Policy be Free Speech?* FORBES (Oct. 25, 2020), https://www.forbes.com/sites/johnkoetsier/2020/10/25/social-censorship-should-social-medias-policy-be-free-speech/?sh=31a65d03489a.

[81] *See* discussion *infra* Section IV.B (describing how social media censorship can increase personal echo chambers for suspended persons).

[82] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[83] Corynne McSherry et al., *Private Censorship is not the Best Way to Fight Hate or Defend Democracy: Here are some Better Ideas*, ELECTRONIC FRONTIER FOUNDATION (Jan. 30, 2018), https://www.eff.org/deeplinks/2018/01/private-censorship-not-best-way-fight-hate-or-defend-democracy-here-are-some.

In response to this threat, Texas enacted an anticensorship law—Chapter 143A: Discourse on Social Media Platforms—to curve platforms' free ability to censor users.[84] More specifically, because of a high number of *deplatformed* Texas politicians, Texas Governor Greg Abbot in September 2021, enacted a law that restricts platforms' ability to censor or remove user's content or profiles based off of the user's "viewpoint."[85] The law defines "censor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."[86] The operational section, § 7, restricts platforms on the following:

> A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.[87]

To summarize, a platform cannot suppress a user's ability to express their viewpoint or inhibit the expression of a viewpoint unless expressly stated by the act's other provisions.[88] The law, however, still allows platforms to censor a user's content based on the following:

1. The social media platform is specifically authorized to censor by federal law;
2. Is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment;

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[84] TEX. CIV. PRAC. & REM. CODE ANN. § 143A.
[85] *See* TEX. BUS. & COM. CODE ANN. § 120.001–120.151. Interestingly, Texas's law does not define "viewpoint likely because the broad interpretation promotes the law's constitutionality. *Id.*
[86] *Id.* § 143A.001(1).
[87] *Id.* § 143A.002.
[88] TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

3. Directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge; or
4. Is unlawful expression.[89]

The law's purpose focused heavily on first amendment protections—the law seeks to safeguard "the modern public square", while further instilling the benefits of an unfettered public exchange of ideas.[90] The author of the bill, Texas state-representative Briscoe Cain, stated, "[a]t this point, a small handful of social media sites drive the national narrative and have massive influence over the progress and developments of medicine and science, social justice movements, election outcomes and public thought . . . ."[91] Likely the catalyst for his support of the bill, Briscoe Cain had been suspended himself from Twitter following a series of tweets he made to former presidential-candidate Beto O'Rourke.[92]

Accordingly, the Texas Legislature stated that the law protected three important interests.[93] First, Texas citizens have a fundamental interest in "the free exchange of ideas and information, including the freedom of others to share and receive ideas and information."[94] Second, Texas has a "fundamental interest in protecting the free exchange of ideas and information in Texas."[95] Third,

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[89] TEX. BUS. & COM. CODE ANN., § 143A.006(a)(1)–(4).
[90] NetChoice, LLC v. Paxton, 49 F.4th 439, 446 (5th Cir. 2022).
[91] Kailyn Rhone*, Social Media Companies can't ban Texans over Political Viewpoints Under New Law*, TEXAS TRIBUNE (Sept. 2, 2021), https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/.
[92] Following Beto O'Rourke's call for a mandatory gun-buyback program, Briscoe Cain tweeted, "My AR is ready for you." Briscoe Cain (@BriscoeCain), TWITTER (Sept. 12, 2019, 10:40 PM). *See* Texas Tribune Staff*, Briscoe Cain says his "My AR is ready for you" Tweet Benefited him, Beto O'Rourke*, TEXAS TRIBUNE (Sept. 28, 2019), https://www.texastribune.org/2019/09/28/briscoe-cain-beto-orourke-gun-tweet/.
[93] House Comm. on Const. Rts. & Remedies, Bill Analysis, Tex. H.B. 20, 87th Leg., R.S. (2021) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 143A).
[94] *Id.*
[95] *Id.*

platforms function as "common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States."[96]

B. Anticensorship laws Challenged on the Basis of "Right not to Speak"

Texas's anticensorship law immediately received challenges from various social media platforms.[97] In May 2022, the Supreme Court issued an emergency stay on Texas's law while the law circulated through the federal court system.[98]

1. The First Amendment Paradigm from the Court's Emergency Stay

Typical of emergency-stay orders, the Supreme Court did not issue any reasons for their decision.[99] However, Justice Alito's dissenting opinion, joined by Justices Thomas, Gorsuch, and Kagan had quite a bit to say.[100] Whether platforms have a traditional *right not to speak*, according to the four dissenting justices, was "quite unclear."[101] The dissent noted that the Court has struck down "direct affiliation" regulations in the past, but that "it [was] not at all obvious how [the Court's] existing precedents, which predate the age of the internet, should apply to large social media companies."[102] However, even with the dissent's uncertainty, these precedents show a clear picture.

2. The PruneYard *Cases*

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[96] *Id.*
[97] Jessica Guynn, *Federal Judge Blocks Texas law that would have Opened Doors for Lawsuits Against Social Media*, USA TODAY (Dec. 1, 2021), https://www.usatoday.com/story/tech/2021/12/01/judge-blocks-texas-facebook-youtube-law/8831600002/ (stating how "Technology trade groups . . . [argued] the law would chill the First Amendment rights of corporations . . . .").
[98] *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting).
[99] *Id.*; *see, e.g.,* SCOTUS BLOG, *Emergency Appeals: Stay Requests*, https://www.scotusblog.com/election-law-explainers/emergency-appeals-stay-requests/ (last visited Jan. 11, 2023, 5:00pm) (explaining that "[t]he justices generally do not explain their decision, and they often do not explicitly indicate how each justice voted.").
[100] *Id.* at 1716.
[101] *Id.*
[102] *Id.* at 1717 (in reference to PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Pac. Gas & Elec. Co. v. Pub. Utilities Com., 475 U.S. 1, 15 (1986) (*PG&E)*; Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 50 (2006); Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. Of Bos., Inc., 515 U.S. 557, 560 (1995); Mia. Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 250 (1974)).

The Supreme Court's *right not to speak* framework arises out of the "*PruneYard*" line of cases. This framework applies when a private entity asserts that a law or regulation is forcing it to affiliate with the speech of another.[103] Under the Court's test in *Rumsfeld v. Forum for Academic Utilities Commission*, a platform must show either: (1) the law or regulation compelled the platform to speak a message or (2) the law or regulation restricted the platform's speech.[104]

In *Miami Herald Publishing Company Division of Knight Newspapers, Inc. v. Tornillo*, the Court struck down a law that required newspaper publishers to produce prints from opposing political candidates when that candidate's character had been referred to in one of the newspaper's earlier publications.[105] The Court found that the law invaded the newspaper's "editorial control, judgment, and autonomy of [the] newspaper editors."[106] The Court explained that this principle of editorial control comes from the special circumstances of newspaper publishing.[107] Because newspapers have high space constraints, publishers had to select and choose what content to produce carefully.[108] Because Florida's law intruded on the newspaper's editorial discretion the newspaper would have to forgo certain selected content in order to comply with the law's content requirements.[109] Therefore, the law impermissibly compelled the newspaper to endorse a message and the law was unconstitutional.[110]

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[103] For clarification, when a platform challenges a law on the basis that the law violates the platform's *right not to speak*, the claim is commonly called a "forced affiliation claim"—the government is forcing an entity to affiliate with a message the entity normally would not. *Rumsfeld*, 547 U.S. at 50.
[104] This alternative-prong standard has been established from the Court's analysis of five cases. *See Rumsfeld*, 547 U.S. at 50; *PruneYard*, 447 U.S. at 88; *PG&E*, 475 U.S. at 15; *Hurley*, 515 U.S. at 560; *Miami Herald*, 418 U.S. at 250.
[105] For a more in-depth analysis of *Miami Herald*, see Clay Calvert, *First Amendment Battles over Anti-Deplatforming Statutes: Examining Miami Herald Publishing Co. v. Tornillo's Relevance for Today's Online Social Media Platform Cases*, N.Y.U L. Rev. 1, 1 (2019).
[106] *Id.* at 9; *see Miami Herald*, 418 U.S. at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute exercise of editorial control and judgment.").
[107] *Miami Herald*, 418 U.S. at 258.
[108] *Id.*
[109] *Id*.
[110] *Id.*

In *PruneYard Shopping Center v. Robins*, the Court held that the California "free distribution law" was constitutional because it did not exact a penalty on the "mall's speech," and the mall could disavow any connection with the message.[111] The Court emphasized that it would be rather difficult for the owner to assert a direct affiliation claim because of the nature of the forum—mall patrons would have the commonsense knowledge not to associate the speech of Mormon-protestors with the owner of the shopping mall.[112] Moreover, the Court focused on the fact that the law was content neutral, rather than content-based—"because no specific message is dictated by the State to be displayed on appellant's property [there is] no danger of governmental discrimination for or against a particular message."[113]

The Court distinguished *PruneYard* from *Miami Herald* for a variety of reasons.[114] Most importantly, the Court emphasized a central question—whether the statute would "'[dampen] the vigor and [limit] the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute."[115] A concern that, unlike, *Miami Herald*, was simply not present because of the nature of the forum.

In *Pacific Gas & Electric Company v. Public Utilities Commission* (*PG&E*), the Court's plurality opinion held that the California Public Utilities Commission's order interfered with PG&E's speech and impermissibly forced the company to associate with the views of other speakers in their own private newsletter.[116] The Court, like *Miami Herald*, held that the law restricted the company's speech due to the limited space in the company print-out—it was now

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[111] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).
[112] *See id.* at 86 (explaining that members of the public would "not likely [associate the pamphlets] with those of the owner.").
[113] *Id.*
[114] *PruneYard*, 447 U.S. at 88 ("[*Miami Herald's*] concerns obviously are not present here.").
[115] *Id.* at 88; *Miami Herald*, 418 U.S. at 257.
[116] Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1, 20-21 (1986) ("*PG&E*").

filled with unwanted material, consequently limiting the available information that the company could voluntarily insert.[117] Furthermore, the order impermissibly required the company to associate with speech with which it may disagree (i.e., a forced affiliation).[118]

The Court reasoned that *PruneYard* did not apply in *PG&E* for three reasons.[119] First, *PruneYard* did not involve a concern that the challenged law "might affect the shopping center owner's exercise of his own right to speak."[120] Additionally, the law was far more intrusive than *PruneYard*—the shopping mall owner had voluntarily opened his property up to the public, whereas *PG&E* was a private business.[121] Second, the right of access law at issue in *Pruneyard* was not content-based, but instead a content-neutral law.[122] Lastly, the nature of the forums in both cases were drastically different—the shopping center in *PruneYard* was a public place, open to anyone, while the company's print-out by nature was closed.[123]

In *Hurley*, the Supreme Court held that a private parade was an expressive form of speech that received First Amendment protection because the parade produced a single message.[124] Because parade organizers only choose particular floats to be in the parade—and the public had no controlling input—the Court likened the parade to the print-out in *PG&E*.[125] Furthermore, the parade organizers were "intimately connected" to the message communicated in the parade.[126] According to the Court, an intimate connection was dispositive because forcing the parade

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[117] *Id.* at 20.
[118] *Id.* at 16; *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (explaining that the First Amendment guarantees "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").
[119] *PG&E*, 475 U.S. at 12.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 16.
[123] *Id.* at n.8.
[124] Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos. Inc., 515 U.S. 557, 581.
[125] *See id.* at 577.
[126] *See id.* at 576.

organizers to include a particular float is tantamount to forcing them to speak: "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[127]

Lastly, in *Rumsfeld*, the Supreme Court held that the First Amendment could not prevent Congress from directly imposing an "access requirement" on private entities.[128] The Court found that the Solomon Amendment did not force the law school to speak because this speech was only "incidental to the Solomon Amendment's regulation of conduct," and was nothing like a government-mandated pledge or motto.[129] Therefore, Congress can compel even incidental speech without violating the First Amendment.[130]

The Court distinguished the facts in *Rumsfeld* from *Miami Herald*, *PG&E*, and *Hurley*—those three cases limited the government's ability to force one speaker to host or accommodate another speaker's message.[131] However, these "compelled-speech violations resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[132] In contrast, the law school was free to disassociate from the speech in their forum.[133] In conclusion, even though the act required law schools to host and accommodate others'

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[127] *Id.*
[128] In 2000, Congress enacted 10 U.S.C. § 983, known as the Solomon Amendment—a law that stripped funding from any institution of higher education that restricted military recruiters' access to their premises. The Forum for Academic and Institutional Rights, Inc. (FAIR)—"an association of law schools and law faculties," challenged the Solomon Amendment. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 47–52 (2006).
[129] *Id.* at 62 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was . . . carried out by means of language, either spoken, written, or printed.").
[130] *Id.* at 70.
[131] *Id.* at 63.
[132] *Id.*
[133] *Id.*

speech, the Solomon Amendment was constitutional because it did not limit what law schools could or could not say, nor did the law compel them to say anything."[134]

3. The Fifth Circuit: NetChoice, LLC v. Paxton

The United States Court of Appeals for the Fifth Circuit decided the case of *NetChoice, LLC v. Paxton* (*NetChoice TX*), in mid-September 2022.[135] Contrary to the ruling of the Eleventh Circuit in *NetChoice, LLC v. Att'y Gen. of Fla.* (*NetChoice FL*), the Fifth Circuit upheld Texas's anticensorship law under the *PruneYard* cases.[136] In summary, the court found that censorship is not a protected activity under the First Amendment.[137] Alternatively, even if censorship was a protected activity, the law was constitutional under *Reed v. Town of Gilbert*'s intermediate scrutiny analysis.[138] Although mainly agreeing with the Eleventh Circuit's analysis, the Fifth Circuit diverged in a few key areas including editorial discretion, common carrier-status[139], and whether censorship equates to a speech-protected activity.[140]

In sum, editorial discretion did not make censorship protected First Amendment activity for two reasons. First, censorship does not involve "selection and presentation," a requirement under Supreme Court precedent.[141] In contrast, platforms censorship comes after content is

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[134] *Id.* at 50.
[135] NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).
[136] *See id.* at 439 ("Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.").
[137] *See generally id.* at 465 (explaining that because § 7 of Texas's law neither forces platforms to speak nor interferes with their ability to speak, the law is constitutional).
[138] *See id.* at 485 (holding that §7 satisfies intermediate scrutiny constitutionality); Reed v. Town of Gilbert, 576 U.S. 155, 155 (2015).
[139] The "common carrier doctrine" vests States' inherent authority to impose rules and regulations on "communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining. *Paxton*, 49 F.4th at 469.
[140] *Id.* at 488.
[141] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998); *see also* Mia. Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 258 (2006) (explaining that because newspapers go through a selective process before publication on what material is included, newspapers engage in editorial discretion).

posted.[142] Second, platforms do not share the same type of space constraints the other platforms do that the Court has analyzed.[143] In conclusion, the Fifth Circuit upheld Texas's law and rejected platforms' argument that "the First Amendment . . . gives them an unqualified license to invalidate laws that hinder them from censoring speech they don't like."[144]

4. The Eleventh Circuit's "Split": NetChoice, LLC v. Attorney General of Florida

A few months prior to the Fifth Circuit's decision, the Eleventh Circuit decided *NetChoice FL*, holding that Florida's anticensorship bill[145] was unconstitutional under the First Amendment.[146] Social media platforms mainly contested the law's content-moderation restrictions, namely the *candidate deplatforming* and *journalistic enterprises* sections.[147] The candidate deplatforming § prohibited a platform from "willfully deplatform[ing] a candidate for office."[148] Additionally, a platform could not "apply or use post-prioritization or shadow banning algorithms for content and material posted by or about . . . a [political] candidate."[149] Lastly, under the journalistic enterprises §, a platform could not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."[150]

In summary, the court found that when a platform engages in censorship on its platforms, this amounted to a protected "exercise of editorial judgment" under the First Amendment.[151] Additionally, the court found that Florida's law unconstitutionally burdened platforms'

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[142] *See Paxton*, 49 F.4th at 465 (explaining that platforms "offer no Supreme Court case even remotely suggesting that *ex post* censorship constitutes editorial discretion akin to *ex ante* selection.").
[143] *Id.* at 462 (citing Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1226 (Thomas, J., concurring) ("space constraints on digital platforms are practically nonexistent . . . .")).
[144] *Paxton*, 49 F.4th at 494.
[145] FLA. STAT. §§ 106.072, 501.2041.
[146] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1232 (11th Cir. 2022).
[147] FLA. STAT. §§ 106.072(2), 501.2041(2)(j).
[148] FLA. STAT. § 106.072(2).
[149] FLA. STAT. § 501.2041(2)(h).
[150] FLA. STAT. § 501.2041(2)(j).
[151] *Id.* at 1209.

prerogative to engage in censorship's protected activity and restricted platform's ability to distance themselves from the associated speech.[152] Yet, questions remain. Which court interpreted First Amendment jurisprudence correctly? Under what circumstances can a platform censor a user's speech? Is censorship that bad? Jurisprudence and public policy weigh in favor of the Fifth Circuit's analysis.

III. TEXAS'S ANTICENSORSHIP LAW SURVIVES CONSTITUTIONAL MUSTER

Freedom of speech under the First Amendment includes the right not to be forced to associate with someone else's speech.[153] Consequently, the government may not "force a private speaker to speak someone else's message."[154] However, the First Amendment permits a state to regulate *conduits* of speech—speech-hosting entities that foster collective ideas of other users.[155] Therefore, under the First Amendment, while states cannot force platforms to speak a message or interfere with the platform's right to publish a message, they can otherwise regulate the platform's conduct.[156]

A. Texas's Anticensorship law is Constitutional Under the Court's Rumsfeld *Test*

Under the Supreme Court's ruling in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, for a platform to mount a successful "forced affiliation"[157] claim, the platforms must show either: (1) the anti-censorship law is compelling the platforms to speak or (2) the law is

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[152] Under Florida's law, a platform could not make any alterations or changes to its "user rules, terms, and agreements . . . more than once every 30 days." *Id.* at 1203; FLA. STAT. § 501.2041(2)(c).
[153] Pac. Gas & Elec. Co. v. Pub. Util. Com., 475 U.S. 1, 14 (1986).
[154] *See* Woolley v. Maynard, 430 U.S. 705, 714 (1977); W.Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624, 642 (1943).
[155] *See* NetChoice, LLC v. Paxton, 49 F.4th 439, 439 (5th Cir. 2022).
[156] *Id.* at 439.
[157] To win a "forced-affiliation" claim, the speech host must show that it is intimately connected with the communication and cannot dissociate itself from it. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 560 (1995).

restricting the platform's speech.[158] Texas's law, however, does not compel platforms to speak any message.[159] Actually, quite the opposite—platforms are regulated in their ability to suppress other's speech.[160] Additionally, platforms are not speaking when they censor a user based off of their user's viewpoint.[161]

1. Texas's law does not Compel the Platforms to Speak

The Supreme Court held in *Rumsfeld* that Congress could implement access requirements on private entities so long as the access requirement did not compel the entity to speak any message.[162] Just as recently as 2018, the Court reiterated the First Amendment risks at stake: "When speech is compelled, however, additional damage is done. [When] individuals are coerced into betraying their convictions . . . to endorse ideas they find objectionable [it] is always demeaning . . . .").[163] Platforms must prove that they are "intimately connected with the communication and hence cannot dissociate itself from it."[164] Yet, as the Fifth Circuit articulated, two problems exist with this proposition: (1) platforms have routinely distanced themselves from user-generated content and (2) the single-articulable message requirement from *Hurley* and *PG&E* is absent.[165]

First, platforms have routinely distanced themselves from being associated with any speech circulating through their platform.[166] In fact, this was one of the primary reasons that platforms

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[158] Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47, 50 (2006).
[159] *Paxton*, 49 F.4th at 459.
[160] *Id.*
[161] *Id.*
[162] *See Rumsfeld*, 547 U.S. at 60.
[163] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464 (2018).
[164] Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 560 (1995).
[165] NetChoice, LLC v. Paxton, 49 F.4th 439, 460 (5th Cir. 2022).
[166] Kate Ruane, *Dear Congress: Platform Accountability Should not Threaten Online Expression*, ACLU (Oct. 27, 2020), https://www.aclu.org/news/free-speech/dear-congress-platform-accountability-should-not-threaten-online-expression.

pushed for § 230 of the Communications Decency Act.[167] In 1995, the New York Supreme Court in *Stratton Oakmont v. Prodigy Services Company*, declared that when platforms suppress user-generated content, they are considered "publishers" of that content—subsequently making platforms liable for any tortious or illegal material.[168] In response, Congress enacted § 230 to overturn *Stratton Oakmont*—marking Congress's (and social media platforms') recognition of the responsibility and nature of who is a "publisher" on a platform.[169]

Second, unlike *Hurley* or *Miami Herald*—where the laws forced the entity to produce a message through a fixed-space platform[170]—platforms cannot be viewed the same way because of the difference in the platforms' space constraints.[171] Unlike newspapers, parades, or broadcasting networks, platforms do not have the same "space constraints . . . [because they] are practically non-existent."[172] Platforms host speech related to thousands of various topics, threads, chat rooms, and other various informational mediums.[173] In contrast, private newspapers and parade-day floats have a limited amount of space to accompany various messages and entities that the hosting entities have sole discretion to allow into that stream.[174] Those entities have to selectively pick-out certain messages over others.[175] Platforms do not have these constraints because they can host practically

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[167] 47 U.S.C. § 230; *see also* Michael D. Smith et al., *It's Time to Update Section 230*, HARVARD BUSINESS REVIEW (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 (explaining how "social-media platforms are granted 'safe harbor' protections . . . .").
[168] Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 1, 9 (N.Y. Sup. Ct., 1995).
[169] 47 U.S.C. § 230(c)(2); *see* Smith, *supra* note 167.
[170] *See* Pac. Gas & Elec. Co. v. Pub. Util. Com., 475 U.S. 1, 15 (1986); Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 250 (1974).
[171] Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).
[172] *Id.*
[173] *See generally* Simon Rogers*, Behind the Numbers: How to Understand Big Moments on Twitter*, TWITTER BLOG (Aug. 08, 2013), https://blog.twitter.com/en_us/a/2013/behind-the-numbers-how-to-understand-big-moments-on-twitter. (explaining how "[e]very two and a half days, a billion Tweets are sent.").
[174] *Knight*, 141 S. Ct. at 1226 (Thomas, J., concurring); *see also* NetChoice, LLC v. Paxton, 49 F.4th 439, 462 (5th Cir. 2022) (holding that because space constraints on social media platforms are practically nonexistent, "[p]latforms can host users' speech without giving up their power or their right to speak their own message(s).").
[175] *Paxton*, 49 F.4th at 462.

an infinite amount of data on their sites in any given moment; therefore, the selective necessity that arose in *Hurley* and *Miami Herald* is not present.[176]

Furthermore, cases where the Court has struck down regulations for compelling speech focus heavily on the "trigger" for enforcement of the specified law, something very different than an *editorial discretion* safeguard.[177] For example, in *Miami Herald*, the regulation was content-based—the entity only was compelled to endorse an opposing political message when the entity itself criticized the character of a political candidate.[178] In contrast, Texas's law does not have a "subject-matter [or content]-based" restriction—instead, the law forbids censorship outright.[179] Conclusively, Texas's law is far more similar to what the Court saw in *Turner Broadcasting System, Inc. v. FCC*, where broadcasting networks were required to carry specific over-the-air networks.[180] However, the Court upheld the law because, unlike *Miami Herald*, there was no content-based trigger.[181]

2. Texas's law does not Block a Platform's Ability to Speak

Platforms are not speaking when they censor a user; therefore, the second prong of *Rumsfeld* is of no matter. To meet the second prong of *Rumsfeld*, platforms must prove that they are the *publisher* of speech when they censor a user.[182] However, platforms have already informed Congress (and Congress understood) that their relationship with their users is not that of a

[176] *Id.*
[177] *Id.* at 463-64.
[178] *Id.*
[179] *Id.*
[180] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 634 (1944).
[181] *Paxton*, 49 F.4th at 463.
[182] *Id.* at 462.

"publisher."[183] Furthermore, platforms don't make a collective point, even as such an extreme example as the parade in *Hurley*.[184] Instead, content is posted from "any user, at any time, in any way that the user sees fit," reflecting a large conglomerate of billions of messages all-at-once from every user.[185]

Nonetheless, citing *Miami Herald*, platforms argue that editorial discretion serves as a barrier to government regulation because platforms are no different than when a newspaper picks and chooses what goes into their newspaper.[186] However, platforms cannot "just shout 'editorial discretion!' and declare victory,"[187] because the Court has only granted editorial discretion *Rumsfeld* protection when the entity is a "*confined* publication with the overall goal of producing a singular message"—something wholly absent with platforms.[188] Tellingly, the district court in *NetChoice, LLC v. Moody*—striking down Florida's anticensorship law—admits this: "[N]ewspapers, unlike socialmedia [sic] providers, create or select all their content, including op-eds and letters to the editors. Nothing makes it into the paper without substantive, discretionary review, including for content and viewpoint."[189]

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[183] Practically, the platforms' argument is contradictory with their concern following the New York Supreme Court's decision in *Stratton Oakmont*, which directly held what the platforms' advocate today. Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 1, 9 (N.Y. Sup. Ct., 1995); Online *Platforms and Market Power, Part 6: Hearing Before the Subcommittee. On Antitrust, Com. And Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 33 (2020) (testimony of Mary Zuckerberg, CEO, Facebook, Inc.).
[184] *Paxton*, 49 F.4th at 461.
[185] *Id.* at 439.
[186] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 634 (1944); Lise Olsen*, Texas' 'Anti-Censorship' Law Censors Social Media. What if it Goes into Effect?*, THE TEXAS OBSERVER (May 20, 2022), https://www.texasobserver.org/texas-anti-censorship-law-censors-social-media-what-if-it-goes-into-effect/ ("The government can't tell a private actor . . . like Facebook . . . what to say, what to include, or what to leave out. That's editorial discretion.").
[187] *Paxton*, 49 F.4th at 464. Commentators continue to heavily debate on whether editorial discretion is a stand-alone category of free speech; however, free speech and editorial discretion are "not definitively coextensive." *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?* 1 J. FREE SPEECH L. 97, 99—100 (2021).
[188] Biden v. Knight First Amend., Inst., 141 S. Ct. 1220, 1224 (Thomas, J., concurring) ("Space constraints on digital platforms are practically non-existent [unlike newspapers, cable companies, and many other analogous entities].") (emphasis added).
[189] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1091 (N.D. Fla., 2022).

Contrary to the opposition, platforms have virtually unlimited space for speech.[190] Therefore, § 7's prohibition does nothing to block platforms from disassociating with a user's post.[191] More importantly, platforms can host user's speech without giving up their power or right to speak their own message—unlike the newspaper's ability to do so in *Miami Herald* or the parade float in *Hurley*.[192] Furthermore, platforms are free to distance themselves from the user's message—unlike a traditional "forced-affiliation" claim.[193] Nonetheless, even if editorial discretion is a freestanding category of First Amendment protected activity—as the Eleventh Circuit held[194]—online censorship does not find safety in the Court's precedent.

First, the Supreme Court held in *Associated Press v. National Labor Relations Board*,[195] that entities who exercise editorial discretion must accept legal responsibility for the content they edit.[196] Yet, following the *Stratton Oakmont* decision, platforms have expressly disclaimed "any reputational or legal responsibility for the content they host."[197] Second, the Supreme Court held in *Arkansas Education Television Commission v. Forbes*, that editorial discretion must involve selection and presentation of content before the content is "hosted, published, or disseminated."[198] Yet, platforms do not edit any content before it is posted; rather, the platforms engage in after-the-fact censorship—a selection process the Supreme Court has never held akin to before-the-fact edits

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[190] *See Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring).
[191] *Paxton*, 49 F.4th at 462.
[192] *Id.*
[193] *Id.*
[194] *See infra* Section V (describing the various legal principles that the Eleventh Circuit used to find an opposite conclusion from the Fifth Circuit).
[195] *See* Associated Press v. NLRB, 301 U.S. 103, 127 (1937).
[196] For example, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, the Court held that a newspaper's "editorial judgments in connection with an advertisement [is liable] when with actual malice [the newspaper] publishes a falsely defamatory [statement]." 413 U.S. 376, 386 (1973); *See Associated Press*, 301 U.S. at 127.
[197] NetChoice, LLC v. Paxton, 49 F.4th 439, 439 (5th Cir. 2022); Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 1, 9 (N.Y. Sup. Ct., 1995).
[198] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

like newspapers, parade floats, and cable-broadcasting networks.[199] In fact, a majority of the content posted never receives any in-person review from the platforms, but instead, surfaces through various algorithms after the initial post.[200]

3. 47 U.S.C. § 230 Dispels Platforms' "Publisher" Argument

Beyond the *Rumsfeld* analysis, social media platforms' most significant shield from judicial accountability, the Communications Decency Act (CDA), supports the Fifth Circuit's findings.[201] Section 230 of the CDA explicitly recognizes platforms as "conduits of speech," rather than publishers of speech.[202] The CDA expressly instructs courts to not treat platforms as "publisher[s] or speaker[s]" of user-generated content; therefore, if the CDA is constitutional—which this Court has long held—platforms should not be treated as publishers.[203] Additionally, congressional fact determinations, are given heavy judicial deference.[204] Yet even without this support, platforms have routinely supported this finding by arguing to the courts that they are conduits, not publishers.[205] For example, they've asserted that the § 230 "promotes the free exchange of information and ideas over the Internet and prevents the inevitable chill of speech that would occur if interactive computer services could be held liable merely for serving as conduits for other parties' speech."[206]

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[199] *Paxton*, 49 F.4th at 465.
[200] *Id.*
[201] *See id.* at 465. ("We have no doubts that Section 7 is constitutional. But even if some were to remain, . . . § 230 would extinguish them.").
[202] § 230 provides that the Platforms "shall [not] be treated as the publisher or speaker" of content developed by other users. 47 USC § 230(C)(1). Online platforms, through the CDA, are immune from defamation liability lawsuits from third parties for the content that the social media platforms host, so long as the platforms do not play a role in the "creation or development" of that content. *Id*.
[203] *Paxton*, 49 F.4th at 466.
[204] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985).
[205] Brief for Appellees at 1, *Klayman v. Zuckerberg*, No. 13-7017 (D.C. Cir. Oct. 25, 2013).
[206] *See id.*

What has transpired has created a contradictory argument.[207] On one hand, platforms have asserted that they are *not* publishers of speech when their users post on their platforms; yet, when their censorship power is threatened, the argument is flipped—it is now supposed to be obvious that platforms are publishers of a message.[208] Because platforms have already acknowledged that they are not speech publishers—unlike newspapers, parade-day floats, or journals—their "speech" is not and cannot be burdened by Texas's anticensorship law.[209] Therefore, § 7 is constitutional under the *Rumsfeld* test.

B. Even if Censorship is Protected Activity under the First Amendment, Texas's law Passes Scrutiny

Even if censorship was recognized as First Amendment activity (i.e., censorship is a valid form of speech), Texas's law—which protects users' viewpoints—survives constitutional scrutiny. Texas's law is constitutional because: (1) the law is content-neutral—it is a regulation that is "unrelated to the content of speech"[210]—and (2) because the law is content-neutral, it is subject to and passes intermediate scrutiny.[211][212]

1. Texas's Anticensorship law is Content-Neutral

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[207] Kathleen Hidy, *Articles and Essays on the First Amendment: The Speech Gods: Freedom of Speech, Censorship, and Cancel Culture in the Age of Social Media*, 61 WASHBURN L. J. 99, 100 (2021).
[208] *Paxton*, 49 F.4th at 468–69.
[209] *Id.*
[210] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).
[211] In contrast, the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" are presumptively unconstitutional. *See generally* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) (explaining the various scrutiny standards the Court uses for content-based and content-neutral laws).
[212] *Id.* For a regulation to be content based, the law must "on its face draw distinctions based on the message a speaker conveys." *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); City of Austin v. Reagan Nat'l Adver. of Austin, LLC, 142 S. Ct. 1464, 1471-74 (2022).

Texas's law, specifically § 7, does not regulate censorship depending on the "ideas or views expressed;" therefore, the law is content-neutral.[213] As the Court explained in *Turner I*, the test for establishing whether a law is content-neutral is "whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys."[214] Applying this test, § 7 draws no distinctions when a user conveys a specific subject-matter.[215] Instead, much like the law in *Turner I*, the law "applies equally regardless of the censored user's viewpoint or motives for the platform's censorship."[216] Furthermore, unlike the content-based law in *Miami Herald*, Texas's law regulates platforms regardless of a subject-matter-based message—it protects any message.[217]

Social media platforms have argued that § 7 is content based—therefore triggering a strict scrutiny analysis—because it is clear that the law was enacted under partisan censorship concerns from Texas Republicans.[218] This argument is incorrect in theory and legally. First, § 7 operates in a non-partisan way—it evenhandedly estops platforms from censoring any individual based on their viewpoint, whether or not that user aligns politically with the Texas legislature (or any partisan views of any government).[219] Second, even if partisan politics played a role, the Court has never struck down a state law "on the basis of what . . . a handful of Congressmen said about it."[220] For example, in regards to Twitter's suppression of "It's Going Down"[221] or Truth Social's

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[213] *Turner I*, 512 U.S. at 643.
[214] *Id.* at 642; *see Town of Gilbert*, 576 U.S. at 163.
[215] This article will not examine Texas's anticensorship law under a "content-based hypothetical" because, as explained in *Town of Gilbert*, such laws are presumptively unconstitutional, which would certainly make Texas's law unconstitutional. *Town of Gilbert*, 576 U.S. at 163.
[216] *Turner I*, 512 U.S. at 643.
[217] In *Miami Herald*, the law only required an opposing message when the publisher spoke on the character of a political candidate; however, § 7 regulates platforms from doing anything regardless of content. Mia. Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 250 (1974)
[218] NetChoice, LLC v. Paxton, 49 F.4th 439, 482 (5th Cir. 2022).
[219] *See id.* at 482.
[220] United States v. O'Brien, 391 U.S. 367, 384 (1968).
[221] *See supra* notes 62–82 and accompanying text.

censorship of the January 6th riot[222]—both actions are prohibited by § 7 because the law protects a user's ability to post their views on any subject matter, regardless of the politically-aligned (or contrary) opinions.[223] Moreover, the Court has cautioned, "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[224]

In conclusion, Texas's anticensorship law operates neutrally—it does not matter the particular message conveyed nor does the law ask for any particular message to be conveyed before its effects are triggered; therefore, the law triggers intermediate scrutiny.[225]

2. Texas's law Passes Intermediate Scrutiny

If a law is content-neutral, it will be found constitutional under the First Amendment "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[226] Therefore, for Texas's law to survive constitutional muster, three things must be shown: (1) Texas must show that preserving the free speech of individuals on social media platforms is an important governmental interest, (2) the law must be unrelated to the suppression of free speech, and (3) the law must not burden more speech than necessary to further that interest.[227] Texas's law satisfies all three criteria.

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[222] *See supra* notes 65–82 and accompanying text.
[223] *Paxton*, 49 F.4th at 482.
[224] *See O'Brien*, 391 U.S. at 384.
[225] *Paxton*, 49 F.4th at 482.
[226] Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997) ("*Turner II*").
[227] *See e.g., Paxton*, 49 F.4th at 482 (5th Cir. 2022) (explaining the three elements for intermediate scrutiny under *Turner II*); *Turner II*, 520 U.S. at 189 (establishing the three intermediate scrutiny elements for a content-neutral speech restriction).

i. Supreme Court Precedent Confirms that Protecting the Free Exchange of Ideas and Information is a Purpose of the "Highest Order"[228]

The Supreme Court has repeatedly held that states have a fundamental interest in "protecting the free exchange of ideas and information in the state."[229] Texas's law preserves and protects the public discourse and keeps the marketplace of ideas open for all types of ideas and individuals.[230] This type of law reflects the Court's analysis in *Packingham v. North Carolina*: "[w]hile in the past there may have been difficulty in identifying the most important places for exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' . . . social media in particular."[231] Practically, due to the amount of precedent, it is difficult to challenge the repeated deference the Court has given to protect the marketplace of ideas; therefore, the first prong is satisfied.

ii. Section 7 is Unrelated to the Suppression of Speech

Under the second prong, Texas's law functions similarly to the law in *Turner I*—the law does not directly target platforms' speech; rather, the law "only obstructs the Platforms' *expression* to the extent necessary to protect the public's 'access to a multiplicity of information sources.'"[232] The law in *Turner I*, was upheld under intermediate scrutiny regardless of any *incidental* suppression because the Court found the regulation necessary to protect the rights and speech of

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[228] Turner Broad. Sys. v. FCC, 512 U.S. 622, 663 (1994).
[229] *See Paxton*, at 93; *Turner I*, 512 U.S. at 663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); *Associated Press*, 326 U.S. 1, 20 ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."); *Packingham v. North Carolina*,137 S. Ct. 1730, 1735 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.").
[230] *Paxton*, 49 F.4th at 484.
[231] *Packingham*, 137 S. Ct. at 1735; *see also* Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 868 (1997) (explaining the importance of protecting the open forum of the internet).
[232] This article maintains that platforms are not "speaking" when they censor user-generated content; however, for the sake of argument, the *Turner I* precedent would apply otherwise. *Turner I*, 512 U.S. at 663—64 (emphasis added).

third parties.[233] Texas's law, comparatively, does not burden, nor attempts to burden, a platform's speech because "it aims to protect individual speakers' ability to speak," not a platform's ability to speak a contrary message. [234] Therefore, § 7 passes this element because it not only protects users' ability to freely post their viewpoint on social media platforms, but it also provides no barrier for platforms to distance themselves from the content.[235]

iii. Section 7 Does not Burden Substantially more Speech than Necessary

Platforms in *Paxton* argued that § 7 burdens substantially more speech than necessary because the law "prohibits demonetization, shadow-banning, de-boosting, and other forms of discrimination in addition to outright bans or content removal."[236] However, these censorship methods cut against the preservation of informational discourse just the same as outright removal of user-generated content.[237]

First, demonetization is equal to outright bans because it limits not only the financial viability of the users affected but also their speech by severely suppressing the user's message to other

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[233] *Id.*
[234] *Paxton*, 49 F.4th at 483.
[235] *Id.*
[236] Under § 143A.001(1) of the act, the word censor includes "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." TEX. BUS. & COM. CODE ANN. § 143A.001(1). Demonetization is when a post, video, or account "loses the ability to earn advertising revenue." Samantha Ferguson*, YouTube Demonetization: What to do if You're Penalized in 2022*, WYZOWL (May 26, 2022), https://www.wyzowl.com/youtube-demonetization/. De-boosting means that replies to your content will be hidden for accounts that do not directly follow your account. M. K. Fain*, Are You in Twitter Jail?*, 4W (Apr. 22, 2022), https://4w.pub/are-you-in-twitter-jail/#:~:text=Reply%20deboosting%20means%20that%20your,who%20already%20agree%20with%20you.
Shadow-banning, commonly known as a "ghost ban" or "deamplification," is when a platform blocks a user without their knowledge, usually "by making their posts and comments no longer visible to other users. Gabriel Nicholas*, Shadowbanning is Big Tech's Big Problem*, THE ATLANTIC (Apr. 28, 2022), https://www.theatlantic.com/technology/archive/2022/04/social-media-shadowbans-tiktok-twitter/629702/; Elon Musk, in the process of releasing the "Twitter Files," uses shadow-banning and "deamplification" interchangeably. Elon Musk (@elonmusk) TWITTER (Jan. 13, 2022, 10:43 PM), https://twitter.com/elonmusk/status/1614121055022350336?cxt=HHwWgICw0YWjweYsAAAA.
[237] *Paxton*, 49 F.4th at 484.

public members.[238] These methods of suppression dismantle the "widest possible dissemination of information from diverse and antagonistic sources" by cutting off virtually all visibility to a user's contribution to the public discourse.[239] Lastly, Texas's methods of preserving its important governmental interest must only be substantially related—not perfectly related.[240] Texas's methods of regulation are seeking to prohibit all types of suppression of speech and the variety of tactics used by platforms.[241]

Furthermore, Texas's anticensorship law is not under-inclusive.[242] The main argument for under-inclusiveness is that because Texas's law only applies to platforms with 50 million-plus monthly users, companies with fewer monthly users should have been grouped into § 7's reach.[243] However, as Justice Powell concurred in *PruneYard*, regulating smaller entities would create unique constitutional problems that are not present in this case.[244]

Texas reasonably tailored the law to encompass the largest platforms because those platforms assert the most market dominance and network control—making them "uniquely in need of regulation to protect the widespread dissemination of information."[245] For example, Facebook—a party represented by *NetChoice*—had roughly 2.934 billion monthly active users in July 2022,[246] while Twitter had 238 million daily active users in July 2022.[247] Texas's law regulates these large

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[238] *See* Brief for The Babylon Bee, LLC, et al. as Amici Curiae Supporting Appellants, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178).
[239] Turner Broad. Sys. v. FCC, 512 U.S. 622, 663 (1994).
[240] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).
[241] *Paxton*, 49 F.4th at 484.
[242] *Turner I*, 512 U.S. at 663.
[243] *Paxton*, 49 F.4th at 484.
[244] *See generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980) (Powell, J., concurring) ("A minority-owned business confronted with leaflet distributors from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion . . . could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak.").
[245] *Paxton*, 49 F.4th at 484.
[246] Simon Kemp, *Facebook Statistics and Trends*, DATAREPORTAL (Aug. 15, 2022), https://datareportal.com/essential-facebook-stats.
[247] *Id.*

platforms (rather than smaller platforms[248]) because they essentially control the "market of ideas" much more than a platform with less than 50 million monthly-users would.[249]

Lastly, platforms are still allowed to censor *unprotected speech*.[250] Platforms are permitted to censor users that engage in the following types of speech: obscenity, fighting words, defamation (including libel and slander), child pornography, perjury, blackmail, incitement to imminent lawless action, true threats, and solicitations to commit crimes.[251] These exceptions, although not explicitly listed in Texas's law, arise from the Court's jurisprudence.[252] Therefore, Twitter, Facebook, and YouTube can use suppressive devices to remove content under these limited categories.[253] In conclusion, even if the Court granted platforms' censorship First Amendment protection, Texas's law passes constitutional muster.

IV. UPHOLDING THE MARKETPLACE OF IDEAS: A DOUBLE-EDGED BENEFIT FOR BOTH SIDES

Beyond the blackletter law, limiting censorship by platforms is necessary both legally and practically. Legally, the Supreme Court has long adhered to Justice Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*—recognizing that it is fundamental to democracy that we keep the "marketplace of ideas" open, allowing ideas to compete against each other until

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[248] The Fifth Circuit reasoned that "regulating smaller platforms would intrude more substantially on private property rights and perhaps create unique constitutional problems of its own." *Paxton*, 49 F.4th at 484; *see also PruneYard*, 447 U.S. at 101 (Powell, J., concurring in part and in the judgment) (indicating if smaller entities were subject to restrictive regulations, additional first amendment issues may be implicated).

[249] *Paxton*, 49 F.4th at 484 ("Texas reasonably determined that the largest social media platforms' market dominance and network effects make them uniquely in need of regulation to protect the widespread dissemination of information.").

[250] *Id.*

[251] FREEDOM FORUM INSTITUTE, *Which Types of Speech are not Protected by the First Amendment?*, https://www.freedomforuminstitute.org/about/faq/which-types-of-speech-are-not-protected-by-the-first-amendment/ (last visited Oct. 16, 2022).

[252] *See id.*

[253] The Fifth Circuit rejected NetChoice's argument that specific carveouts were required to survive constitutional scrutiny. *Paxton*, 49 F.4th at 484 ("With regard to carveouts, the [p]latforms do not explain how [censorship exceptions] would have meaningfully advanced Texas's interest in protecting a widespread marketplace of ideas—especially when such speech enjoys no constitutional protection.").

the best win out.[254] Additionally, censorship itself often has adverse personal effects on people and the ideas they wish to express.[255]

A. The Legal Importance of Keeping the Marketplace of Ideas Open

George Washington once said, "If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter."[256] It is not to say that every idea is correct or morally justified; however, the legal concept of the exchange of ideas is too important to allow free-reign censorship of controversial or questionable ideas. A primary purpose of the First Amendment is to safeguard this "marketplace" of ideas because, without it, too many voices are silenced by the powerful few who shape the discourse.[257]

Unfettered free speech, as Justice Holmes explained in *Abrams*, is the "experiment . . . of our system," that best benefits society by being built on the "best truth . . . accepted in the competition of the market . . . ."[258] The function of democracy and the public discourse amongst the people "must be able to freely 'generate, debate, and discuss both general and specific ideas, hopes, and experiences.'"[259] The Court has long held (and will continue to hold) that this public discourse is essential to democracy and the furtherance of the nation's political and social values.[260]

For these reasons, anticensorship laws function as a safeguard against the encroachment platforms put on the marketplace. Furthermore, other scholars have emphasized that these values

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[254] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[255] *See* discussion *infra* Section IV.B.
[256] George Washington, President of the United States, Address to the Officers of the Army (Mar. 15, 1783).
[257] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see generally* Mary-Rose Papandrea, *The Missing. Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1728 (2019) (asserting that "[t]he marketplace of ideas theory has played a dominant role in the Court's free speech jurisprudence.").
[258] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
[259] Barr v. Am. Ass'n of Political Consultants, 591 U.S. (Breyer, J., dissenting).
[260] Meyer v. Grant, 486 U.S. 414, 421 (1988) ("The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'").

in unfettered discourse are of the utmost importance.[261] However, even if peoples' ideas may seem misguided, ill-informed, or outright silly, the proper remedy should be to "disapprove of what you say, but . . . defend . . . your right to say it"—not suppress the idea altogether.[262] People have a right to be their own truth-seekers. For example, following the capitol riots on January 6, 2021, within five days, 70,000 users were suspended from Twitter for asserting their beliefs on QAnon-related conspiracy theories.[263] This, coupled with conservative factions expressing thoughts on the 2020 presidential election, led Twitter to engage in a massive effort to remove accounts tweeting information that went against their civic integrity policy.[264] But who is to say that Twitter should correct my misunderstanding of the election or the COVID-19 pandemic? What is the fear? Bots? Internet trolls? No matter the fear, platforms' actions can often lead to far worse results.

B. How Censorship Leads to Echo Chambers and Polarization

This censoring of ideas that may seem "extreme" to some often makes the situation worse. For example, a recent report by the Royal Society (Great Britain's equivalent of the National Academy of Sciences) reported that content censorship that is "misinformation" results in harmful consequences to human inquiry.[265] Much like Twitter's "civic integrity policy," by funneling

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[261] *See* Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J.L. & POL'Y 1, 16 (2021).

[262] Pamela Paul, *Better Ways for Us to Argue and Disagree*, THE NEW YORK TIMES (Sept. 26, 2022), https://www.nytimes.com/2022/09/26/opinion/letters/debate-argument.html.

[263] *See* Andrew Hutchinson, *Twitter has Suspended More Than 70,000 Accounts Following the Capitol Riots*, SOCIAL MEDIA TODAY (Jan. 11, 2021), https://www.socialmediatoday.com/news/twitter-says-its-suspended-more-than-70000-accounts-following-the-capitol/593193/.

[264] *See generally* Joseph Menn et al., *Twitter, Facebook Suspend some Accounts as U.S. Election Misinformation Spreads Online*, REUTERS (Nov. 3, 2020), https://www.reuters.com/article/usa-election-twitter/twitter-facebook-suspend-some-accounts-as-u-s-election-misinformation-spreads-online-idUSKBN27K08F (explaining that during the 2020 election "Twitter Inc and Facebook Inc . . . suspended several recently created and mostly right-leaning news accounts posting information about voting in the hotly contested U.S. election for violating their policies.").

[265] Denyse O'Leary, *Royal Society: Don't Censor Misinformation; It Makes Things Worse*, MIND MATTERS (Jan. 25, 2022), https://mindmatters.ai/2022/01/royal-society-dont-censor-misinformation-it-makes-things-worse/.

misinformation "underground . . . it is less likely to be exposed to countervailing opinions,"—a necessary piece of human discovery.[266]

An echo chamber is a social environment where "a person only encounters information or opinions that reflect and reinforce their own."[267] The political polarization that occurs from censorship creates these echo chambers because it creates an exclusive environment by "curating news feeds and 'friends' online who share their political views . . . ."[268] Numerous research reports evidence that not only do people lean towards exclusively associating themselves with conforming beliefs but that when these individuals are opposed, a hostile response is probable.[269] This "us vs. them" split not only reinforces bias but shifts individual's positions into further extreme ideologies, "pitting . . . ideological group[s] against the other and exacerbating the political divide within America.[270]

One of the major benefits Texas's law is that it allows users to escape these polarizing echo chambers on the most prominent platforms—something that researchers have concluded leads to less-hostile polarization.[271] A study done by A.L.A.N. Analytics empirically concluded that the censorship done by Twitter, Facebook, and Instagram has the "capacity to initiate or contribute to a process of self-radicalization."[272]

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[266] The report goes on to say that online misinformation like "climate change or vaccine safety, can harm individuals and society . . . [because it] is not a silver bullet and may undermine the scientific process and public trust." *Id.*
[267] GCF GLOBAL, What is an Echo Chamber? https://edu.gcfglobal.org/en/digital-media-literacy/what-is-an-echo-chamber/1/ (last visited Oct. 21, 2022, 12:00pm).
[268] Justin Lane, et al., *Is Radicalization Reinforced by Social Media Censorship?*, (Mar. 23, 2021), https://arxiv.org/pdf/2103.12842.pdf.
[269] *See* Leeper, T. J. et al., *Political Parties, Motivated Reasoning, and Public Opinion Formation*, POLIT. PSYCHOL. 35, 129–156 (2014); Iyengar, S. et al., *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, J. COMMUN. 59, 19–39 (2009).
[270] Marielle DeVos, *The Echo Chamber Effect: Social Media's Role in Political Bias*, INSTITUTE FOR YOUTH IN POLICY (Jun. 21, 2021), https://www.yipinstitute.com/article/the-echo-chamber-effect-social-medias-role-in-political-bias. Media Use in 10 Countries. J. COMPUT. COMMUN. 21, 349–367 (2016).
[271] *Id.*
[272] *See* Lane, *supra* note 268.

The evidence suggests an over-arching conclusion on the effect of censorship: When an individual gets censored by a platform for expressing himself, the feeling he experiences can come in the form of "identity non-verification . . . ."[273] By experiencing this feeling, censored individuals often seek to associate themselves with other censored-individuals whose "ideas [have been deemed] similarly "unacceptable" by the platform.[274] What occurs next is the primary fear—when individuals "ruminate about shared dysphoric experiences" there is a bonding between similar members, resulting in "increased fusion" of their personal identities.[275] The final step in this echo chamber concoction—according to the law of "group polarization," members of these echo chambers "embolden more moderate group members who will, in turn, look to even more extreme group archetypes as models as ideal group member behavior."[276] The best example of this trend is the 2020 election—in 2020, 90% of Joe Biden supporters expressed that if Donald Trump were elected, it would lead to severe, lasting harm to the United States.[277] Alternatively, 89% of Donald Trump supports expressed that if Joe Biden were elected, the same result would follow.[278] These findings, are increasingly multiplied through various internet algorithms that cluster like-minded people together.[279]

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[273] Identity Non-Verification is a feeling someone gets when they have been denied the ability to express themselves and their identity in the future. Hogg, M. A., *Self-Uncertainty, Social Identity, and the Solace of Extremism. Extremism and the Psychology of Uncertainty*, (eds. Hogg, M. A. & Blaylock, D. L.) 19–35 (WileyBlackwell, 2012).
[274] *Id.*
[275] Jong, J., Whitehouse et al., *Shared Trauma Leads to Identity Fusion via Personal Reflection*, PLoS One 10, e0145611 (2016).
[276] *See* Lane, *supra* note 268; Sunstein, C. *The Law of Group Polarization*, J. POLIT. PHILOS. 10, 175–195 (2002).
[277] *See* Michael Dimock et al., *America is Exceptional in the Nature or its Political Divide*, PEW RESEARCH CENTER (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.
[278] *Id.*
[279] Joshua A. Tucker, et al., *Social Media, Political Polarization, and Political Disinformation: A Review of Scientific Literature*, HEWLETT FOUNDATION (Mar. 2018), https://www.hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf.

According to these principles, censorship only drives a further divide within the marketplace of ideas. It may be correct that not every censored person will storm the Capitol, join a white supremacy group, or engage in terrorist activity; however, by keeping the flow of information available between the masses and allowing people to disagree with the information they may not agree with, it decreases the likelihood that these groups act via the actions of platforms.

V. THE ELEVENTH CIRCUIT'S PROBLEMATIC APPROACH TO EDITORIAL DISCRETION AND CENSORSHIP

As discussed, the primary reason Texas's law passes constitutional muster is that it evenhandedly restricts platforms from censoring users based on any viewpoint, regardless of the subject matter.[280] However, like Florida's SB7072, [281] not every anticensorship law automatically passes these standards.[282] Equally as important, absent a couple of small disagreements, the Fifth Circuit's ruling in *NetChoice TX* and the Eleventh Circuit's ruling in *NetChoice FL* are reconcilable.

A. Florida and Texas's Anticensorship Laws are Distinguishable

The Fifth and Eleventh Circuit's rulings are largely reconcilable because Florida's law, SB 7072, violates the Court's ruling in *Rumsfeld*—Texas's law, does not.[283] Florida's law only targeted censorship of speech by political candidates and "journalistic enterprises," as well as speech about political candidates.[284] Uniquely, the law prohibited platforms from censoring speech by or about political candidates with no exceptions.[285] However, non-journalist speech unrelated

[280] *See supra* notes 198-203 and accompanying text.
[281] FLA. STAT. §§ 106.072, 501. 2041.
[282] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1196 (11th Cir. 2022).
[283] NetChoice, LLC v. Paxton, 49 F.4th 439, 488–89 (5th Cir. 2022).
[284] *Id.*
[285] *Id.*

to a political campaign, could be censored full stop.[286] As best summarized in *Paxton*, "SB 7072 prohibits all censorship of some speakers, while [Texas's law] prohibits some censorship of all speakers."[287] Furthermore, specific provisions *prima facie* violate the second prong of *Rumsfeld*—they interfere with the regulated platform's speech.[288]

Both of these provisions violate *Rumsfeld* because the law forbids platforms from speaking through modification of their terms and conditions.[289] Additionally, the law restricts platforms from distancing themselves from the speech on their platform—a primary protection under *right-not-to-speak* cases.[290] In contrast, Texas's law has no such limitations—platforms are free to modify their terms and conditions, and distance themselves from the content of any user by posting messages, addendums, or other tools. The same *Rumsfeld* and *PruneYard* concerns are not at issue.

B. Addressing the "Split"

The Fifth and Eleventh Circuits are split on two important issues: (1) whether or not editorial discretion is an independent category of First Amendment-protected expression and (2) whether or not censorship is a protected activity.[291] For the following reasons, the Fifth Circuit's construction of constitutional precedent is correct, and if the Supreme Court decides to take up certiorari, the *Paxton* standard should be adopted.

1. Editorial Discretion is not an Independent Category of Protected Speech

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[286] FLA. STAT. § 501.2041(2)(j).
[287] *Paxton*, at 107-08.
[288] For example, Florida's law forbids the platforms from posting an "addendum to any content or material posted by a user," as well as forbidding platforms from "[modifying their] rules, terms, and agreements [more than once every thirty days]." FLA. STAT. § 501.2041(1)(b); FLA. STAT. § 501.2041(2)(c); FLA. STAT. § 501.2041(1)(b).
[289] *Paxton*, 49 F.4th at 492.
[290] For example, Twitter could not post an addendum to a tweet reading Twitter in no way associates, affirms, agrees, or disagrees with the above-stated content because the addendum would violate § 501.2041(1)(b); *Id.*; *see generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (explaining that the shopping mall owner was in no way required to affirm the expression and "[was] free to publicly dissociate [himself] from the views of the speakers or handbillers.").
[291] *Paxton*, 49 F.4th at 490.

The Eleventh Circuit held that *editorial discretion* is a principle where platforms have a First Amendment right to "[control] whether, to what extent, and in what manner to disseminate third party-created content to the public."[292] However, this proposition contradicts binding Supreme Court precedent for two reasons.

First, *Miami Herald* and *Turner I* did not recognize a distinct, seperate principle of editorial discretion; instead, those two cases focused on whether the challenged regulation fell into the *Rumsfeld* test—did the rule either compel the entity to speak or restrict the entity's ability to speak.[293]

If editorial discretion were a stand-alone principle, the Courts in those cases would not have invoked the *Rumsfeld* prongs because editorial control would have served as a special carveout.[294] Second, an "editorial discretion principle" is in direct conflict with *Rumsfeld*.[295] In *Rumsfeld*, as discussed,[296] the school asserted a "First Amendment right to decide whether to disseminate or accommodate a military recruiter's message."[297] The Supreme Court rejected an editorial discretion argument by holding that the controlling inquiry was whether the Solomon Amendment limited what law school could say or compelled them to say anything at all.[298]

2. Censorship is not a Protected Activity Under the First Amendment

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[292] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1212 (11th Cir. 2022).
[293] In *Miami Herald*, for example, Florida's right-of-reply law forced the newspaper to convey an editorial endorsement of speech it opposed and limited its opportunity to engage in other speech it would have preferred. *See* 418 U.S. 241, 256–58 (1974). Likewise, in *Turner I*, the Court explained that "must-carry rules regulate cable speech" because they obstruct cable operators' ability to express or convey the particular messages or programs they have chosen. 512 U.S. 622, 636–37 (1994).
[294] *Paxton*, 49 F.4th at 490.
[295] *Id.*
[296] *See supra* Part III (describing how the test from *Rumsfeld* is applied to Texas's anticensorship law).
[297] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 53 (2006).
[298] *See generally id.* at 60 (explaining that the Solomon Amendment "affect[ed] what law schools must do—afford equal access to military recruiters—not what they may or may not say.").

The Eleventh Circuit held that platforms have a similar editorial discretion to newspapers and cable operators.[299] The court reasoned that this *editorial discretion* is synonymous to past cases.[300] For example, the Eleventh Circuit stated:

> Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices 'not to propound a particular point of view.'[301]

In support of this proposition, the Eleventh Circuit cited multiple examples of this type of "cultivation."[302] For example, YouTube seeks to "create a 'welcoming community for viewers' and . . . prohibits a wide range of content" for this goal.[303] Additionally, Facebook engages in content censorship to "foster 'authenticity,' 'safety,' 'privacy,' and 'dignity,' and accordingly, removes or adds warnings to a wide range of content . . . ."[304]

With this foundation, the Eleventh Circuit concluded that all decisions about "what speech to permit, disseminate, prohibit, and deprioritize . . . fit . . . within the Supreme Court's editorial-judgment precedents."[305] Yet, as the Fifth Circuit held, this assertion finds no basis in the Court's

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[299] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1213 (11th Cir. 2022) ("Platforms employ editorial judgment to convey some messages, but not others, and thereby *cultivate* different types of communities.").
[300] *Id.*
[301] The Eleventh Circuit equated a platform's "community guidelines" as evidence of editorial discretion—because certain posts and content go against the platform's ideas of what the community represents, this amounted to First Amendment activity. *Id.* at 1213.
[302] *Id.*
[303] YOUTUBE, *Policies and Guidelines*, https://www.youtube.com/creators/how-things-work/policies-guidelines (last visited May 15, 2022).
[304] META, *Facebook Community Standards*, https://transparency.fb.com/policies/community-standards (last visited May 15, 2022).
[305] Att'y Gen. of Fla., 34 F.4th at 1214.

precedent.[306] If the Supreme Court adopted the Eleventh Circuit's "cultivation" rule, platforms essentially "[could] establish a First amendment right to censor by invoking any generalized interest"[307]—a sharp contrast from the Court's holding in *PruneYard* and *Rumsfeld*.[308] Under the Eleventh Circuit's approach, telephone companies, email providers, shipping services, and any other entity engaged in facilitating speech, would be granted an unfettered right to censor speech by "merely gesturing towards 'safety' or 'dignity.'"[309] This has no basis in the First Amendment's precedent.[310]

Ultimately, the Fifth Circuit's approach is legally and practically sounder under the Supreme Court's precedent.[311] The Supreme Court needs to resolve this issue (and likely will take up either the Fifth or Eleventh Circuit's appeal) in favor of the Fifth Circuit because it is the correct analysis of the "right not to speak" precedent under the First Amendment.[312]

VI. Model Legislation

For all of the reasons above, states should adopt legislation modeled on Texas's anticensorship law to preserve every person's right to the flow of public information. In order to survive a constitutional challenge under *Rumsfeld*, any law must meet the following criterion: (1)

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[306] NetChoice, LLC v. Paxton, 49 F.4th 439, 491 (5th Cir. 2022). ("If the Eleventh Circuit's rule was the Supreme Court's rule, then [*Hurley* and *PG&E*] would have been analytical softballs.").
[307] *Id.* at 493.
[308] *Id.*
[309] *See, e.g.*, *id.* at 119 (explaining that a generalized interest does not serve as a free exemption to censor third parties under the Supreme Court's precedent).
[310] *Id.*
[311] The Fifth Circuit concluded by denying all of the constitutional arguments made by social media platforms, reversing the lower court. *Id.* ("We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's fee speech guarantee. The Platforms are *not* newspapers. Their censorship *is not speech*.") (emphasis added).
[312] As of January 20, 2023, the Supreme Court is deciding whether to take up the Eleventh Circuit's decision in *NetChoice FL*. Scott Bomboy, *Is the Supreme Court Ready to Reshape the Social Media Landscape?*, National Constitution Center (Dec. 23, 2022), https://constitutioncenter.org/blog/is-the-supreme-court-ready-to-reshape-the-social-media-landscape. Furthermore, Ken Paxton and the Attorney General's Office of Texas has filed a petition for writ of certiorari. Petition for Writ of Certiorari at 1, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), https://www.supremecourt.gov/DocketPDF/22/22-277/238398/20220921115005927_Netchoice%20v.%20Moody%20Cert%20Petition%20for%20filing.pdf.

the law can in no way restrict platforms from speaking; (2) the law cannot compel the platforms to speak in any way through any medium—addendums, private messages, terms and conditions; (3) the law cannot regulate social media companies by focusing on a "content-based" regulation—the law must be content-neutral.[313] Two parts are necessary—a definition § defining censorship and the limitations of censorship and an operative clause. The operative § serves as the direct regulation on what platforms can and cannot do.

A. The Definition Section

Key to establishing the bounds of the law, certain words must have fixed definitions for the operative section to do what it is supposed to do. These words include Censor, Expression, Receive, Social Media Platform, User, and Viewpoint. The following definitions encompass a valid constitutional scope:

- *Censor* means to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access, or visibility, to, or otherwise suppress a user's expression."[314]
- *Expression* means "any word, music, sound, still, or moving image, number, or other perceivable communication."[315]
- *Receive* means "in terms of expression, to read, hear, look at, access, or gain access to a user's expression."[316]

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[313] As discussed above, the third limitation only is triggered if the Supreme Court held that social media censorship was akin to protected speech. *See supra* Part III.B.2.
[314] This definition is modeled after Texas's definition of "censor." TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(1).
[315] This definition is modeled after Texas's definition of "expression." TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(2).
[316] This definition is modeled after Texas's definition of "receive." TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(3).

- *Social Media Platform* means "an Internet website or application that is used by the public, with a minimum of at least 50 million monthly users, that allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, expression, images, or messages."[317]
- *User* means "a person who posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform. This term includes a person who has a social media platform account that the social media platform has disabled or locked."[318]
- *Viewpoint* means "a position or perspective from which some subject-matter is considered or evaluated by a user."[319]

The way "viewpoint" and "expression" are defined is necessary to guard the law against a "content-based" reading. By regarding each to encompass any subject matter, the expression remains content neutral.[320]

B. The Operative Section

This section will enforce the anticensorship regulation onto platforms and limit their ultimate ability to suppress user-produced content based on the user's viewpoint. The following operative provision satisfies the above criterion:

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[317] This definition is modeled after Texas's definition of "social media platform." TEX. BUS. & COM. CODE ANN. § 120.001(1).
[318] This definition is modeled after Texas's definition of "user." TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(6).
[319] One thing that the Texas law does not do is expressly define the word "viewpoint." This not only can lead to confusion for what constitutes a *viewpoint*, but additionally, it leave the law's scope unclear. Therefore, this model legislation includes a working definition. *Viewpoint*, MERRIAM-WEBSTER (3d ed. 2022).
[320] *See generally* NetChoice, LLC v. Paxton, 49 F.4th 439, 480 (5th Cir. 2022) (explaining how Texas's law is content-neutral because "Section 7 applies equally regardless of the censored user's viewpoint, and regardless of the motives . . . animating the Platform's viewpoint-based or geography-based censorship.").

(a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on the following circumstances:

(1) The viewpoint of the user or another person regardless of the subject-matter of the topic;

(2) The viewpoint represented in the user's expression or another person's expression regardless of the subject-matter of the topic; or

(3) A user's geographic location in this state or any part of this state.

(b) This section applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.

(c) This section does not apply to any user-produced content that is expressed in the scope of the following topics:

(1) Obscenity[321][322];

(2) Defamation[323];

(3) Libel[324];

(4) Slander[325];

(5) Child Pornography[326];

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[321] Miller v. California, 413 U.S. 15, 18-19 (1973).
[322] This model legislation purposefully leaves out the "fighting words" doctrine for two reasons: (1) the doctrine is extremely confusing and unclear on what amounts to "fighting words," so attempting to articulate that online would almost seem impossible, but (2) this doctrine would likely be abused by administrators because it remains unclear without more circumstances. *See* Burton Caine, *The Trouble With "Fighting Words": Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 445 (2004).
[323] *See* Rosenblatt v. Baer, 383 U.S. 75, 87 (1966).
[324] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 568 (1942).
[325] *See* New York Times v. Sullivan, 376 U.S. 254, 292 (1964).
[326] *Id.*

(6) Perjury[327];

(7) Blackmail;

(8) Incitement to Imminent Lawless Action and Solicitations to Commit Crimes;[328] and

(9) True Threats.[329]

(10) Any Other Speech not protected under [state's] law.

C. Differences between Model Law and Texas's Anticensorship Law

Ultimately, Texas's law, namely § 7, reflects the approach states should follow in implementing their own legislation. However, this model legislation proposes censorship categories that platforms can exercise under a law per the Supreme Court's precedent. An anticensorship law's scope, like Texas, would face additional First Amendment challenges if it did not cover these various realms of unprotected speech.

However, the more "gray-area" tests under the Court's First Amendment jurisprudence are intentionally omitted because the intent is harder, if not impossible, to articulate online. For that reason, among others, the "fighting words doctrine" from *Chaplinsky v. New Hampshire*, is omitted. Ultimately, by adding additional restraints to § 7, the interests of all parties are protected. Platforms can continue to remove harmful and illegal content from their platforms, while users can continue to express their viewpoints on otherwise protected speech under the First Amendment.

VII. CONCLUSION

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[327] *See generally Chaplinsky*, 315 U.S. at 568.
[328] Take for example a situation where a Twitter user attempts to recruit other users to storm a government building. SMP's could censor this speech in an effort to limit the possible violent outcome of the incitement. *See supra* text accompanying notes 32-34.
[329] True threats mean "those statements where the speaker *means to communicate* a serious expression of intent to commit an act or unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003).

The value of maintaining open discourse and allowing protected speech to flow through the internet is of the utmost importance.[330] It allows the best ideas to win in the competition of democracy.[331] It incentivizes people's understanding of contrary ideas. Texas's anticensorship law provides a constitutional mechanism for protecting these interests under the First Amendment and the Supreme Court's understanding of private speech regulation.[332] Although platforms lose their right to censor specific speech on their platforms, the maintenance of preserving the "experiment of free speech,"[333] is necessary to maintain.

The Supreme Court should not only take up this case to resolve the circuit split[334], but states should also enact legislation that limits platforms' ability to censor freely.[335] A content-neutral regulation that limits a platform's ability to censor a user's viewpoint strikes a constitutional balance between a private entity's ability to remove harmful speech and a user's right to contribute to public discourse.[336] Texas's law fits squarely within the Court's understanding of the First Amendment and rightfully deplatforms censorship by social media platforms.[337]

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[330] *See supra* Part IV.A (illustrating the legal importance of the Court protecting users against censorship).
[331] *Id.*
[332] *See supra* Part III (describing how Texas's law passes the Court's *Rumsfeld* standard).
[333] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see supra* notes 153–200, 254–264 and accompanying text.
[334] *See supra* note 312.
[335] However, the Supreme Court on January 23, 2023 denied certiorari for the appeals from *NetChoice TX* and *NetChoice Fla*. *See generally* Lauren Feiner, *Supreme Court Punts on Texas and Florida Social Media Cases that Could Upend Platform Moderation*, CNBC (Jan. 23, 2023, 2:58 PM), https://www.cnbc.com/2023/01/23/supreme-court-punts-on-texas-and-florida-social-media-law-cases.html (explaining that the Court "delayed a decision on whether to take up a pair of cases challenging social media laws in Texas and Florida.").
[336] *See supra* Parts III, IV (highlighting how anticensorship laws must be content-neutral before they can pass the Court's First Amendment standards).
[337] NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

Applicant Details

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Journal(s)	**The Review of Litigation, American Journal of Criminal Law**
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June 11, 2023

The Honorable David S. Morales
U.S. District Court for the Southern District of Texas
United States Courthouse
1133 N. Shoreline Boulevard, Room 320
Corpus Christi, Texas 78401

Dear Judge Morales:

I am a rising third-year student at The University of Texas School of Law writing to apply for a 2024-25 term clerkship in your chambers. As a lifelong North Texas resident, I am excited about the possibility of clerking in your chambers in Corpus Christi before starting my litigation career in the Dallas office of Bradley Arant Boult Cummings.

Before obtaining my college degree, I worked as a warehouse assistant, landscaper, retail associate, gym supervisor, and referee. I used the money from these jobs to cover schoolbooks, food, and rent. None of the jobs were glamourous, but they taught me to strive for my dream career. For most of my undergraduate education, this "dream career" was a philosophy professorship. Then, after joining Mock Trial and volunteering at an immigration clinic, I learned that I could use the skills I developed in philosophy to help others through a career in law. Ultimately, I plan to pursue appellate law, which is the area that has most interested me throughout law school. But first, I will practice litigation to gain an understanding of the process at the trial court level. I hope to clerk in your chambers to gain a better understanding of the trial court process, as I know that this experience will vastly improve my perspective when I enter appellate practice.

Attached please find my application for a clerkship in your chambers for the 2024-25 clerkship term. My application includes my resume, transcripts, and writing sample. Letters of recommendation from Matthew Murrell, Kayla Oliver, and Brian Gillett are included in this application packet. My recommenders may be reached as follows:

- Matthew Murrell, Lecturer, The University of Texas School of Law
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- Kayla Oliver, Adjunct Professor, The University of Texas School of Law
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- Brian Gillett, Senior Attorney, Bradley Arant Boult Cummings LLP
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Respectfully,

Hayden Tiner

Enclosures

Hayden Tiner

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  - Director of Development, 2023-24
- AMERICAN JOURNAL OF CRIMINAL LAW, Staff Editor, 2022-23
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EXPERIENCE

Bradley Arant Boult Cummings, Dallas, Texas
Summer Associate, June 2022 – August 2022, May 2023 – August 2023 (expected)

- Wrote memos for insurance coverage, fraud, and anti-kickback cases.
- Assisted in drafting lis pendens to cloud title to real estate in breach of contract case.
- Drafted petition in pro bono case involving drug dealing in low-income Dallas neighborhood.

United States District Court for the Eastern District of Texas, Sherman, Texas
Judicial Intern with The Honorable Amos L. Mazzant, III, May 2022 – June 2022

- Drafted memorandum opinions and orders for criminal and civil cases.
- Proofread Rule 12(b)(6) dismissal and Rule 56 summary judgment orders for co-interns and clerks.

RealPage, Richardson, Texas
Product Support Agent, January 2021 – May 2021

- Assisted clients over email and telephone to resolve issues with smart IoT devices.
- Managed and documented support tickets using a CRM tool.
- Wrote and edited support documents to assist other agents with troubleshooting.

Opening Doors International Services, Denton, Texas
Volunteer Intern, Immigration Legal Services, June 2020 – August 2020

- Proofread DACA renewal applications, family petitions, and other USCIS forms.
- Performed intake calls to gather client information and schedule legal consultations.

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Prepared on June 2, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

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FAL 2021	421	CONTRACTS		4.0	B+	DSS
	427	TORTS		4.0	A-	MFW
	533	CIVIL PROCEDURE		5.0	A	CMS
	332R	LEGAL ANALYSIS AND COMM		3.0	A	M M
SPR 2022	423	CRIMINAL LAW I		4.0	A+	DPJ
	431	PROPERTY		4.0	B+	KH
	232S	PERSUASIVE WRTG AND ADV		2.0	B+	NJR
	434	CONSTITUTIONAL LAW I		4.0	A-	TR
FAL 2022	381R	ALTERNATIVE DISPUTE RES		3.0	A	ADJ
	483	EVIDENCE		4.0	A-	GBS
	284W	ADV LGL WR: APPEALS	P/F	2.0	CR	KO
	387W	APPELLATE ADVOCACY		3.0	A	RMR
	492C	BUSINESS ASSOCIATIONS		4.0	A	JCD
SPR 2023	381C	CONST LAW II: CONST HIS		3.0	B+	WEF
	184W	6-ADV LGL WR: WORKSHOP	P/F	1.0	CR	WCS
	385	PROFESSIONAL RESPONSIBI		3.0	A-	FSM
	486	FEDERAL COURTS		4.0	A-	SIV
	397S	SMNR: CITIZENSHIP		3.0	A	MJC

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.75
SPR 2022	30.0	30.0	30.0	3.70
FAL 2022	46.0	46.0	44.0	3.91
SPR 2023	60.0	60.0	57.0	3.68

06-02-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

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Writing Sample

This sample excerpts a brief I wrote last semester in an appellate writing class. I have summarized the facts and legal question below:

Facts: Howard Bekavac (plaintiff-appellant) is a blind man. He wanted to order barbeque from a restaurant called Klingenmaier's BBQ2U (defendant-appellee). But Klingenmaier's BBQ2U only serves food through catering or delivery services and only accepts orders online. The Klingenmaier's BBQ2U website displays pictures of the food options with no accompanying text, so it is incompatible with screenreaders that blind individuals like Bekavac use to navigate the internet. Thus, Bekavac could not order barbeque from Klingenmaier's BBQ2U. Bekavac sued under the ADA for disability discrimination.

Legal Question: The case raises an issue of statutory interpretation—Are websites a "public accommodation" subject to Title III of the ADA? The district court held that websites are not a "public accommodation" and granted summary judgment to Klingenmaier's BBQ2U. In this brief, Bekavac asks the Eighth Circuit to reverse summary judgment because websites are a "public accommodation."

Argument

I. The district court erred in granting summary judgment because websites are a "public accommodation."

Websites are a "public accommodation" subject to Title III of the ADA. The plain text of Title III supports this conclusion. But even if the Court finds ambiguity in the text, three extrinsic aids—legislative intent, DOJ regulations, and common law—resolve this ambiguity. Whether the text is plain or ambiguous, the result is the same. Therefore, this Court should reverse and hold that websites are a "public accommodation."

A. The meaning of "public accommodation" in Title III of the ADA unambiguously includes websites.

Under the text of 42 U.S.C. §§ 12181–12182, websites are a "public accommodation." Statutory interpretation starts with the text. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Section 12182(a) provides, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

Other circuits are split on interpreting "public accommodation." The First and Seventh Circuits have concluded that "public accommodation" includes websites. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12

(1st Cir. 1994); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999). But the Third, Sixth, and Ninth Circuits have concluded that "public accommodation" refers only to physical places. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Corp.*, 198 F.3d 1104 (9th Cir. 2000). Some district courts in the Eighth Circuit prefer the First and Seventh Circuits' reasoning. *See, e.g.*, *Hutcheson v. JPMorgan Chase Bank*, No. 6:14–cv–03499–MDH, 2015 WL 5096040 at *3 (W.D. Miss. Aug. 28, 2015). Because this Court has not decided the issue, this Court should adopt the First and Seventh Circuits' reasoning and hold that websites are a "public accommodation." To reach this result, the Court could rely on three textualist supports:

(1) The list of "public accommodations" in § 12181 contains a service that does not require a customer's presence;
(2) The preposition "of" in § 12182 does not require "public accommodation" to be a place; and
(3) The word "place" in § 12182 does not limit public accommodations to physical locations.

First, the ADA's definition of "public accommodation" uses an example that does not require a customer's presence. The ADA defines "public accommodation" by providing a list of twelve general categories. *See* 42 U.S.C. § 12181(7). Section 12181(7) lists several places—e.g., grocery stores, theaters, and zoos. *Id.* But, as the First Circuit noted in *Carparts*, the list includes "travel service." *Carparts*, 37 F.3d at 19; *see also* 42 U.S.C.

§ 12181(7)(F). Travel services are often provided remotely. *Carparts*, 37 F.3d at 19. Thus, by including "travel service," Congress intended for "public accommodation" to denote more than physical locations. In the court's words in *Carparts*, Congress intended to "include providers of services which do not require a person to physically enter an actual physical structure." *Id.* This weighs against interpreting "public accommodation" to include only physical places.

Second, the preposition "of" in § 12182 does not require "public accommodation" to mean only physical places. Section 12182(a) prevents discrimination against people with disabilities that would deny them equal enjoyment of the "accommodations *of* any place of public accommodation." 42 U.S.C. § 12182(a). At least two courts have compared this use of the preposition "of" to other prepositions such as "at" or "in." *See Pallozi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999) ("The term 'of' generally does not mean 'in,' and there is no indication that Congress intended to employ the term in such an unorthodox manner."); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) ("The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."). Whereas the prepositions "at" and "in" describe spatial relationships,[1] Congress chose to use "of"—a preposition that does not

[1] "At" is "a function word to indicate presence or occurrence *in, on, or near*." *At*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) (emphasis added). "In" is "a function word to indicate *inclusion, location, or position* within limits." *In*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) (emphasis added). Both words describe relations to physical space.

imposes a spatial requirement.[2] *See Pallozi*, 198 F.3d at 33; *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201. Thus, the ADA's guarantee of full and equal enjoyment *of* a place of public accommodation does not limit "public accommodation" to mean only physical places.

Third, the use of the word "place" in § 12182 does not require a physical location. The list of public accommodations in § 12181(7) uses various words such as "place," "office," and "establishment." *E.g.*, 42 U.S.C. § 12181(7)(B) (listing an "*establishment* serving food or drink") (emphasis added). But the ADA does not define "place" or "place of public accommodation." *See id.* § 12181. This led one court to conclude that "Congress likely used the word 'place' because there was no less cumbersome way to describe businesses that offer those particular goods or services to the public." *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572 (D. Vt. 2015).

Even if Congress used "place" for some other reason, this word does not require Title III to exclude websites. The Internet is a place. For example, the Supreme Court has characterized cyberspace as "one of the most important *places* to exchange views." *Packingham v. N.C.*, 137 S. Ct. 1730, 1735 (2017) (emphasis added).[3] And, in any event, the ADA uses a different word to

[2] Although the preposition "of" can describe spatial relationships—e.g., north of the river—, this is not the preposition's function in § 12182. Instead, "of" in § 12182 "indicate[s] a particular example belonging to the class denoted by the previous noun." *Of*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

[3] Various linguistic expressions align with this understanding of cyberspace as a place: cyber*space*, chat *room*, internet *forum*, digital *library*, web *address*,

describe physical structures: "facility." *See, e.g.*, 42 U.S.C. § 12181(2) (defining commercial facilities); 42 U.S.C. § 12183 (discussing new construction in facilities). If Congress wanted to limit § 12182 to physical structures, Congress would have prohibited discrimination in a "facility" of public accommodation. *See Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 395 (E.D.N.Y. 2017) ("The Act could have easily cabined the prohibition on discrimination to the goods, services, etc. of a 'facility' . . . or used the world 'facility' instead of 'place,' but it did not."). Thus, the word "place" in § 12182 does not show Congress intended to limit "public accommodation" to physical places.

Based on these three textual supports, this Court should hold that the meaning of "public accommodation" in § 12182 includes websites.

B. Extrinsic aids support holding that websites are a "public accommodation."

Beyond the plain text of § 12182, three extrinsic aids support holding that websites are a "public accommodation." This Court could find § 12182 ambiguous. The presence of a circuit split indicates "some measure of ambiguity in the text." *Scribd*, 97 F. Supp. 3d at 568–69. Further, some district courts in the Eighth Circuit have suggested that § 12182 is ambiguous. *See, e.g.*, *Mardel, Inc. v. Hunter*, 4:16-CV-00510-BRW, 2017 WL 157744

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web*site*, *domain* name, fire*wall*, *home* page, data*base*, social media *platform*, internet *traffic*, fire*wall*, file *path*, web *portal*, *gateway*, *queue*, and *storage*.

at *1 (E.D. Ark. Jan. 11, 2017) ("[T]he law does not appear to be as black-and-white as Defendant suggested.").

But even if § 12182 is ambiguous, this Court should interpret "public accommodation" to include websites. When interpreting ambiguous statutes, courts consider extrinsic aids such as the purpose of the statute. *See Robinson*, 519 U.S. at 346. Three extrinsic aids show that websites are a "public accommodation": (1) legislative history, (2) DOJ regulations, and (3) common law.

1. Congress defined "public accommodation" broadly so that the term would keep up with modern advances.

Congress intended the ADA's definition "public accommodation" to be broadly construed and adapt to modern advances. There are three indicators of this intent.

First, the "Findings and purpose" section of the ADA indicates that websites are a public accommodation. Congress passed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA cannot serve this purpose if companies can discriminate online. Likewise, the findings section states, "physical or mental disabilities in no way diminish a person's right to fully participate *in all aspects of society*, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." *Id.* § 12101(a)(1) (emphasis added). Full participation in all aspects of society requires participation in e-commerce. Finally, Congress listed communication barriers among the various forms of discrimination against people with disabilities. *Id.*

§ 12101(a)(5). Bekavac faced a communication barrier on Klingenmaier's website. CR 28. Therefore, the language in the "Findings and purpose" section indicates that Congress intended to eliminate the type of discrimination Bekavac faced.

Second, the legislative history indicates that websites are a "public accommodation." Congress intended for the list of public accommodations in § 12181(7) to be interpreted broadly. *See, e.g.*, S. Rep. No. 116, at 59 (1990) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation."). Also, Congress intended the ADA to adapt to technological advances. *See* H.R. Rep. No. 101-485(II), at 108 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 391 ("[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.").

Third, the title of § 12182 indicates that websites are a public accommodation. The title of a statute assists in interpreting an ambiguous word or phrase. *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012) ("The title and headings are permissible indicators of meaning."). Section 12182 is titled "Prohibition of discrimination by public accommodations." 42 U.S.C. § 12182. Unlike the text of § 12182, this title does not include the word "place." *Id.* Thus, "public accommodation" in § 12182 includes websites.

As these sources indicate, Congress intended for Title III of the ADA to:

(1) cover the type of discrimination Bekavac faced;
(2) evolve with modern advances; and
(3) apply to more than just "places."

The Court can uphold each of these goals by holding that websites are a "public accommodation."

2. *The Department of Justice asserts that websites are a public accommodation.*

The Department of Justice takes the position that websites are a public accommodation. The DOJ enforces the ADA. *See* 42 U.S.C. § 12188(b). Because the DOJ enforces the ADA, the DOJ's regulations receive *Chevron* deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The DOJ regulations define "place of public accommodation" using essentially the same categories as those listed in § 12181(7). *Compare* 28 C.F.R. § 36.104, *with* 42 U.S.C. § 12181(7). Thus, the DOJ regulations do not resolve any ambiguity. Still, the DOJ has repeatedly asserted in various documents and hearings before Congress that websites are a "public accommodation."[4] The DOJ's

[4] *See, e.g.*, Letter from Deval L. Patrick, Assistant Att'y Gen., to Senator Tom Harkin (Sept. 9, 1996) ("Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet."); *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong., 2d Sess. 65–

opinion, though not controlling, is "entitled to respect" if it has the power to persuade. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Thus, the DOJ's opinion supports holding that websites are a "public accommodation."

3. The common law supports interpreting "public accommodation" to include websites.

The common-law origin of public-accommodation law also supports holding that websites are a "public accommodation." The Supreme Court has looked to the common-law origin of public-accommodation law when interpreting Title III of the ADA, the Civil Rights Act of 1964, and state public-accommodation laws. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692–93 (2001) (Scalia, J., dissenting) (Title III of the ADA); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (Civil Rights Act of 1964); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) (state public-accommodation law).

The common-law origin of public-accommodation law is the innkeeper rule. Under the innkeeper rule, people who made a profession of providing goods and services to the public could not arbitrarily refuse to serve a customer. *Hurley*, 515 U.S. at 571. As one English court articulated the rule:

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010 (2000) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); 75 Fed.Reg. 43460–01 (July 6, 2010) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations.").

> The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants.

R v. Ivens, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P.1835). The innkeeper rule centers around provision of goods and services to the public. Under this common law approach, Bekavac—as a customer—had a right to receive goods and services from Klingenmaier's because the Klingenmaier's website provides goods and services to the public. CR 18. The common law supports interpreting § 12182 to achieve this result.

Congress intended "public accommodation" to keep up with the times. The DOJ's position and the common law doctrine further support Congress's intent. All three extrinsic aids suggest that this Court should resolve any ambiguity in Title III in favor of holding that websites are a "public accommodation."

Therefore, whether the text of § 12182 is plain or ambiguous, the result is the same: websites are a "public accommodation" subject to Title III of the ADA.